SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 731

MICHAEL J. HEALY, CHIEF OF POLICE OF MANCHESTER, N. H., APPELLANT,

vs.

LOUIS D. RATTA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW HAMPSHIRE

Equity. No. 222

LOUIS D. RATTA, Complainant,

vs.

MICHAEL J. HEALY, Chief of Police of Manchester, New Hampshire, Defendant

BILL OF COMPLAINT—Filed November 4, 1931

Respectfully represents Louis D. Ratta that he is a resident of Springfield, in the County of Hampden and Commonwealth of Massachusetts, and is not a resident of the State of New Hampshire; that the defendant, Michael J. Healy, is Chief of Police of the City of Manchester, in the County of Hillsborough and State of New Hampshire, and as such Chief has under him a large number of City Policemen, all of whom are charged with the detection of crime and the prosecution of all offenses against the criminal laws of the State of New Hampshire committed within said City of Manchester. Said plaintiff complains against said defendant, and says:

1. That plaintiff is, and since the 19th day of April, 1928, has been continuously, a distributor of Air-Way Sanitary Systems, parts, accessories and supplies therefor throughout the states of New Hampshire and Vermont, and during all of such time down to the present has maintained an office and place of business at No. 1015 Elm Street, in the City of Manchester, aforesaid; that on or about the first day of September 1930, the plaintiff enlarged his scope of operations and established an office in the City of Springfield, aforesaid, from which he has conducted the business in said states of New Hampshire and Vermont and the portion of Massachusetts adjacent to the City of Springfield; that plaintiff sells such goods which are commonly known as vacuum cleaners to dealers in the states aforesaid, at wholesale, for resale by such dealers by direct selling, commonly

called house to house canvassing, to the ultimate consumers, and also personally sells such goods at retail by canvassing [fol. 3] from house to house; that during all of said time plaintiff has had a large number of written contracts termed "Dealers' Franchises" in which plaintiff, as distributor, and such dealers, as dealers, agree respectively to sell and buy for resale, as aforesaid, Air-Way Sanitary Systems, parts, accessories and supplies in the State of New Hampshire; that said goods are meritorious products and largely used in private homes and public buildings throughout the State of New Hampshire; that prior to July 1, 1931, plaintiff had built up a large and profitable business in said goods in the State of New Hampshire and in said City of Manchester, and that said dealers are largely permanent residents of New Hampshire and that the resale of said goods by said dealers in the City of Manchester and elsewhere in the State of New Hampshire had been highly profitable to such dealers until the first day of July, 1931.

2. On the 14th day of April, 1931, the Governor of the State of New Hampshire approved Chapter 102 of the Laws of 1931 entitled "An Act relating to hawkers and peddlers." By the terms of said Act the terms "hawker" and "peddler" include any person who goes from town to town or from place to place in the same town selling or carrying for sale, or exposing therefor, any goods, wares or merchandise, thereby including within said definition the plaintiff and his said dealers above-mentioned; that by the provisions of said Act no hawker or peddler is allowed to sell or carry for sale any goods, wares or merchandise unless he holds and pays for a special license so to do in accordance with the provisions of said Act, and any person selling or exposing for sale without such license is liable to a heavy fine; that said Act further provides that provisions thereof shall not apply "to wholesalers or jobbers selling to dealers only, nor to commercial agents or other persons selling by sample, lists, or catalogs, nor to any person selling provisions, agricultural implements, fruit trees, vines, shrubs, books, newspapers, pamphlets, products of his own labor or the labor of his family and the products of his own farm or the one which he tills, the manufacturers of furniture and ladders excepted." Said Act further requires that said license shall be granted by the Secretary of State but that the applicant

therefor must first file with said Secretary a certificate signed by the mayor of a city or a majority of the selectmen of a town, stating that to their best knowledge and belief the applicant therein named is of good moral character and is or has declared his intention to become a citizen of the United States, and that such license shall not be granted to any other person. It is further provided by said Act [fol. 4] that "any soldier or sailor disabled in any war in which the United States has been engaged, or by sickness or disability contracted therein or since his discharge from the service because of such service, and the widow of any such soldier or sailor so long as she remains unmarried, or any citizen of this state over seventy years of age, shall be exempt from paying the license fees required by this chapter"; that said Act further provides that the Secretary of State and the State Treasurer shall be authorized to employ such assistance and to incur such expense for the administration of said Act as the Governor and Council shall approve; that shortly after the passage thereof said Secretary of State did employ one or more assistants directly and through said assistant or assistants informed the various prosecuting officers throughout the state, including the defendant, of the passage of said Act and of the terms thereof, and instructed them that the plaintiff and his said dealers were within the provisions of said Act, and that they should be arrested and prosecuted unless they obtained licenses in accordance with the provisions of said statute.

3. That said Act and the instructions of the Secretary of State to the various prosecuting officers of the state, including the defendant, was called to the plaintiff's attention shortly before July 1, 1931; that immediately the plaintiff arranged through his representative for a conference with the Secretary of State, and arranged to have his said dealers discontinue the sale of said appliances pending an attempt to work out a program for the sale of said appliances that would be satisfactory to the New Hampshire state authorities; that thereafter the matter was taken up with the said Secretary of State and with the Attorney-General, and the plaintiff in an attempt to provide continued occupation for his dealers and to avoid their being arrested under said statute, directed said dealers in New Hampshire to discontinue selling and delivering such goods on house to house

canvass and solicitation and in lieu thereof to solicit signed orders for such goods, such orders to be mailed to the plaintiff at his main office in Springfield, Massachusetts, goods to fill said orders to be shipped by mail or express from Springfield, aforesaid, and delivery thereof to be made strictly in interstate commerce, and said method has been followed continuously down to the present time; that said method of selling in interstate commerce has not been and cannot be successful, and plaintiff's said dealers in New Hampshire have been almost totally unable to transact any business under that method, and as a result thereof many of plaintiff's dealers have been compelled to abandon said [fol. 5] business and either seek other employment or go without employment, while a limited number who have continued to practice said plan have been unable to sell any substantial quantity of the plaintiff's appliances; that from his office in the City of Manchester, plaintiff directs and has directed the operations of all his dealers in New Hampshire, said office being the headquaurters for the handling of customers' accounts, customers' service calls and the supplying of said dealers with their merchandise, so that all of plaintiff's dealers in the State of New Hampshire look to the City of Manchester as their headquarters, and therefore, the suppression of the selling activities of plaintiff's dealers in Manchester has had a state-wide effect, and has practically destroyed plaintiff's business in the entire state; that by reason of the facts aforesaid, a large number of plaintiff's said dealers in New Hampshire have either entirely or largely lost their means of livelihood and become impoverished and plaintiff has been unable to replace them with other dealers, plaintiff's sales have declined almost to the vanishing point, and he has suffered great and irreparable loss and damage.

4. That in said discussion of said statute with the Secretary of State and Attorney-General, plaintiff proposed to said state officers that plaintiff and his said dealers in New Hampshire be permitted without license to go from town to town or from place to place in the same town selling or bartering or carrying for sale or barter, and exposing therefor his said goods according to the following method, to wit, that the plaintiff and his said dealers would severally demonstrate and exhibit the performance of their goods by ex-

posing and demonstrating a sample unit complete in all its parts, and in the event an order for a similar article could be procured from a prospective customer, the sample thus demonstrated would be left with such intending purchaser as security only for the subsequent delivery of an identical article from a stock not then present or immediately near the place of sale, all such subsequent deliveries to be made not earlier than the next day following the taking of said order; that plaintiff was informed by the Secretary of State and the Attorney-General that such method of selling would not be interpreted by them as a sale by sample within the exception of Section 3 of Public Laws Chapter 157, as amended by said Act, and that if plaintiff or his dealers attempted to sell their goods in such fashion they would be arrested and prosecuted for violation of said Act, [fol. 6] whereby the plaintiff was prevented from putting said proposed program into effect.

5. That plaintiff has had prepared, at considerable expense, a price list and catalog of said goods in the form annexed hereto and marked Exhibit A, intending to have his said dealers in New Hampshire comply with the provisions of said Section 3 by selling said goods by sample, list and catalog, and sought the advice of the defendant as to whether he could safely advise his said dealers to adopt that method of selling in the City of Manchester; that the said plan of selling by sample, list and catalog so submitted to the defendant, is as follows: "That the dealer would approach his prospective customer in the course of canvassing from place to place and house to house with a copy of said catalog and price list, and exhibit thereby the line of appliances, parts, accessories and supplies therefor which he was engaged in selling; that he would exhibit to the prospective customer one of the Air-Way Sanitary Systems shown in said catalog and demonstrate to the prospective customer the manner in which it was to be used, disclose the price and terms upon which it would be sold and solicit an order; that if the prospective purchaser could be pursuaded to sign an order for one of said cataloged items, the dealer would take such order therefor and either part or all of the purchase price thereof as might be agreed upon with the customer, and would fill said order not earlier than the next following day from a stock of goods not then present

at or immediately near the place of sale; and as security to the purchaser for the delivery of the goods so purchased, the dealer would leave with the prospective purchaser the article used in such demonstration, and upon making delivery of the article purchased, the dealer would pick up and carry away the sample article so left as security; that the defendant informed the plaintiff that he had been instructed by the Secretary of State that unless the goods delivered on an order taken upon the showing of sample, list and catalog, were shipped to the purchaser from without the State of New Hampshire, such selling would not be within the exception of said Section 3, and if plaintiff or his dealers adopt such method, defendant will be compelled to make arrests and prosecute them; that plaintiff then advised the defendant that he and his dealers would go about their business in their former fashion, that is, by canvassing from place to place and house to house offering to sell or barter, solicit orders and make present delivery upon all sales procured from a stock of goods then present, and the said defendant then stated to the plaintiff that if such [fol. 7] method were followed he would arrest plaintiff and his dealers and prosecute them.

6. That said statute is in contravention of the state and federal constitutions, and therefore void; that said statute is in contravention of the provisions of the bill of rights of the Constitution of the State of New Hampshire and Article IV, Section 2 of, and Article XIV of the amendments to, the Constitution of the United States, in that by reason of the exceptions and exemptions provided therein, and otherwise, the plaintiff is denied the equal protection of the laws, is denied the rights, privileges and immunities granted to the citizens of the State of New Hampshire, and his property is taken without due process of law; that the exceptions set forth in said Section 3 are arbitrary, unjust and discriminatory, and bear no relation to any legitimate purpose of said statute; that the distinction therein made between persons selling by sample, lists or catalogs, and others not so selling, is arbitrary, discriminatory and unjust, and bears no relation to any legitimate purpose of said statute; that the distinction between a person selling provisions, agricultural implements, fruit trees, vines, shrubs, books, newspapers, pamphlets, the products of his own labor or the labor of his family, and the products of

his own farm or the one which he tills, the manufacturers of furniture and ladders excepted, and other persons selling other articles, including the articles handled by the plaintiff and his dealers, is arbitrary, discriminatory and unjust, and bears no relation to any legitimate purpose of said statute; and that to enforce said arbitrary, unjust and discriminatory exceptions deprives the plaintiff of his property without due process of law, and denies him the equal protection of the laws; that the provisions of Section 5 of said Act requiring the applicant to procure a certificate of character from local town and city officers as a prerequisite to his obtaining a license from the Secretary of State places an unjust burden upon the plaintiff and other citizens of other states, denies him the privileges and immunities of citizens of the State of New Hampshire who can more easily procure such certificates of character, and places such an unjust burden upon the citizens of other states as to deprive the plaintiff of his property without due process of law, and denies him the equal protection of the laws; that the fees required to be paid for licenses obtained under Sections 7 and 8 of said statute are excessive, unjust, inequitable and unduly burdensome; that they are so graduated and arranged that as a practical proposition every applicant, in order to do a profitable business, must [fol. 8] obtain a state-wide license and pay the fee therefor, to wit, $50.00, and such fee is all out of proportion to the amount of business to be done by any one person in house to house canvassing, with the result that the plaintiff has been unable to obtain dealers willing and able to pay the license fee or fees required by said section 7 or said section 8; that by reason of the unjust, inequitable and burdensome provisions of said Sections 7 and 8, the plaintiff is deprived of his property without due process of law; that the exemptions provided by Section 11 of said Act are arbitrary, unjust and discriminatory, deprive the plaintiff, as a citizen of Massachusetts, of the privileges and immunities allowed to citizens of New Hampshire, and deprive him and his dealers of their property without due process of law, and deny to him and his dealers the equal protection of the laws; that exemption of soldiers or sailors and/or their widows as therein provided, is arbitrary, unjust and discriminatory, bears no relation to any legitimate purpose of the statute and deprives the plaintiff of his property without due process of law, and denies him the

equal protection of the laws; that the exemption of citizens of the State of New Hampshire over seventy years of age as therein provided, is arbitrary, unjust and discriminatory and bears no relation to any legitimate purpose of the statute, deprives the plaintiff of his property without due process of law, denies him the equal protection of the laws and denies him, as a citizen of the Commonwealth of Massachusetts, the immunities and privileges allowed to citizens of the State of New Hampshire.

7. That under present conditions and with the defendant threatening as aforesaid to arrest the plaintiff's dealers on account of all sales of such appliances where delivery is made otherwise than strictly in interstate commerce, the plaintiff's business in the State of New Hampshire and in Manchester is practically at a standstill; that by reason of the fact that the prosecution of this business in the ordinary way involves travel by the plaintiff and his said dealers from house to house into the homes, climatic and weather conditions influence the total amount of business to be done, and the plaintiff's appliances are actually sold in much larger quantities during the open months and until about the first of December, when sales show a substantial decline, and do not revive again until open spring weather and spring housecleaning season arrives; that the plaintiff's experience has shown that the dealers cannot and do not travel so freely in cold and inclement weather and that housewives do not and will not readily admit dealers into their houses in cold and inclement weather; that by reason [fol. 9] of the defendant's threats of arrest as aforesaid, the plaintiff is being unlawfully deprived of substantial business profits and is suffering and will continue to suffer irreparable damage unless the defendant and the other members of the Manchester City police force working with and under him are restrained and enjoined from arresting and prosecuting the plaintiff and/or any dealers now or hereafter employed by him for the sale of said appliances by canvassing from house to house as aforesaid; that justice requires that said defendant and the other police officers of the City of Manchester working with and under him be restrained and enjoined from interfering with the business of the plaintiff and/or his dealers in canvassing for, and making sales of, said appliances or otherwise undertaking to uphold and enforce said unconstitutional statute;

that unless said defendant and the other police officers of the City of Manchester working with and under him are forthwith enjoined from in any manner attempting to enforce such unconstitutional statute, there is grave and imminent danger that the plaintiff's business in the State of New Hampshire and in said City of Manchester will be totally destroyed and that by reason of the time of year and the approach of the winter season the plaintiff will lose a large proportion of the year's business and most if not all of his remaining dealers between the date hereof and the middle of December unless said defendant and other police officers are restrained and enjoined as aforesaid; and that justice and equity require that a temporary injunction issue forthwith restraining and enjoining the defendant and the other police officers of the City of Manchester working with and under him from arresting or prosecuting or otherwise interfering with the plaintiff and his dealers in the sale of Air-Way Sanitary Systems, parts, accessories and supplies therefor or in any way attempting to enforce against them or any of them the provisions of Chapter 102 of the 1931 Laws of New Hampshire or any of the provisions thereof.

Wherefore, the plaintiff prays:

(1) That the defendant and all other police officers of the City of Manchester working with and under him be restrained and enjoined from arresting or prosecuting and/or threatening to arrest or prosecute or otherwise interfering with the plaintiff and/or his dealers or any of them on account of or in connection with the prosecution by the plaintiff and/or his dealers or any of them of the business of selling by canvassing from house to house Air-Way Sani- [fol. 10] tary Systems, parts, accessories and supplies therefor, or otherwise attempting to enforce the provisions of Chapter 102 of the 1931 Laws of New Hampshire or any portion thereof against the plaintiff and/or any of his said dealers;

(2) For a temporary restraining order, forthwith;

(3) For an order to show cause why a preliminary injunction should not issue pending a determination of this case; and

(4) For such further orders as to this Honorable Court may seem just in the premises.

——— ———, by His Attorneys, Demond, Woodworth, Sulloway and Rogers.

Duly sworn to by Louis D. Ratta. Jurat omitted in printing.

And on said fourth day of November, A. D. 1931, a subpœna in due form was issued which, thereafter on, to wit, the fifth day of November, A. D. 1931, was returned served into Court.

This action was duly entered in the October Term, 1931, when and where the parties appeared by their respective solicitors.

IN UNITED STATES DISTRICT COURT

COMPLAINANT'S MOTION TO AMEND BILL OF COMPLAINT—Filed November 17, 1931—Allowed November 24, 1931

Now comes the plaintiff in the above entitled action and moves to amend his original bill in equity by inserting after Paragraph 2, Paragraph 2A, as follows:

[fol. 11] On the 14th day of April, 1931, the Governor of the State of New Hampshire approved said Chapter 102 of the Laws of 1931, entitled "An Act Relating to Hawkers and Peddlers." The provisions of this Act are as follows:

1. Amendment. Chapter 157 of the Public Laws is hereby amended by striking out the whole thereof and substituting therefor the following:

1. Definition. Except as hereinafter expressly provided, the terms "hawker" and "peddler" as used in this chapter shall mean and include any person, either principal or agent, who goes from town to town or from place to place in the same town selling or bartering or carrying for sale or barter or exposing therefor, any goods, wares or merchandise.

2. Prohibition; Penalty. No hawker or peddler shall sell or barter or carry for sale or barter, or expose therefor,

any goods, wares or merchandise, unless he holds a license so to do as herein provided. Any person violating this section shall be fined not more than two hundred dollars, to be equally divided between the state and the town in which the offense was committed. Such sums as may be paid into the state treasury as penalties shall be credited to the secretary of state for his use in the enforcement of this chapter.

3. Exceptions. The provisions of this chapter relating to hawkers and peddlers shall not apply to wholesalers or jobbers selling to dealers only, nor to commercial agents or other persons selling by sample, lists, or catalogues, nor to any person selling provisions, agricultural implements, fruit trees, vines, shrubs, books, newspapers, pamphlets, the products of his own labor or the labor of his family, and the product of his own farm or the one which he tills, the manufacturers of furniture and ladders excepted.

4. Applications. The secretary of state shall grant such license to any person who files in his office a certificate, signed by the mayor of a city or a majority of the selectmen of a town, stating that, to their best knowledge and belief, the applicant therein named is of good moral character; and is, or has declared his intention to become, a citizen of the United States. Such license shall not be granted to any other person.

5. Certificates. The mayor or selectmen, before granting such certificate, shall require the applicant to make oath that he is the person named therein, and that he is, or has declared his intention to become, a citizen of the United States. They shall forthwith act upon such application when made, and shall at once issue a certificate to the applicant if found qualified.

[fol. 12] 6. Local Licenses. The secretary of state shall cause to be inserted in every license a synopsis of this chapter and the names of such cities and towns as the applicant selects, with the sums to be paid to the respective treasurers thereof, as provided in section 7, and shall receive from the applicant one dollar for each city and town so inserted.

7. Fees. Every person licensed under the preceding sections shall pay to the treasurer of each city or town men-

tioned in his license the following sums before offering or exposing for sale any goods, wares or merchandise therein: For every town of not more than one thousand inhabitants, according to the census next preceding the date of his license, five dollars; for a town of more than one thousand and less than two thousand inhabitants eight dollars; for a town of more than two thousand and not more than three thousand inhabitants, ten dollars; and for every thousand inhabitants in excess of three thousand, one dollar. The treasurer shall certify on the face of such license the sum so paid, which shall be for the use of such city or town.

8. State Licenses. The secretary of state, upon conditions required in section 4, shall grant special state licenses upon the payment by the applicant of fifty dollars for the use of the state as a state license fee, and the person so licensed may do business as a hawker or peddler in any city or town in this state, without further payments.

9. Term; Transfer. All licenses issued under the provisions of this chapter shall bear date the day they are issued and shall continue in force one year. A license granted under section 8 may be transferred by the secretary of state, upon application therefor, accompanied by a fee of one dollar and upon evidence furnished by the applicant like that required for the original granting of such license, and the tranferee of a license granted under said section 8 may go about carrying for sale or barter, exposing therefor and selling or bartering any articles described therein within the state. The secretary of state may make rules and regulations consistent with law covering the transfer of licenses granted under said section 8.

10. Record. The secretary of state and the treasurers of cities and towns shall keep records of all such licenses upon which the sums herein provided have been paid to them, with the number of each, the names and residences of the persons licensed and the sums received thereon, and all such records shall be open for public inspection.

11. Persons Exempt. Any soldier or sailor disabled in any war in which the United States has been engaged, or by sickness or disability contracted therein or since his discharge from the service because of such service, and the widow of any such soldier or sailor so long as she remains

unmarried, or any citizen of this state over seventy years [fol. 13] of age, shall be exempt from paying the license fees required by this chapter.

12. Endorsing License; Exhibiting License; Use of Badges. Every person licensed as a hawker or peddler shall endorse his usual signature upon his license. When his license is demanded of him by a mayor, selectmen, alderman, town or city treasurer, sheriff or his deputy, any constable or police officer or any person to whom he sells or offers or exposes for sale his wares, he shall forthwith exhibit the same, and if he neglect or refuse so to do he shall be liable to the same penalty as if he had no license. The secretary of state shall, at the expense of the licensee, provide a badge for each peddler, and such badges shall bear the number of the license, the word "peddler," and such other information as the secretary of state may deem necessary. Each peddler shall wear his badge in a conspicuous place.

13. License Effective Where. No license shall be effective in any place other than the place or places wherein it authorizes the licensee to operate.

14. Revocation of Licenses. Any license granted by the secretary of state to a hawker or peddler may be revoked by him (1) upon conviction of the licensee of any offense which in the judgment of the secretary warrants such revocation, or (2) upon the submission to the secretary of evidence satisfactory to him that, during the term of the license, and acting under cover thereof, the licensee has accepted or solicited money otherwise than through a bona fide sale or barter of goods, wares or merchandise, or has in any manner begged or solicited alms from the public, or (3) for any other sufficient cause. Whenever any person is convicted of a violation of any provision of this chapter, relative to hawkers and peddlers, the clerk of the court in which, or the trial justice by whom, such person was convicted shall notify the secretary of state.

15. Counterfeiting Licenses, etc. Whoever counterfeits or forges a license, or has a counterfeited or forged license in his possession with the intent to utter or use the same as true, knowing it to be false or counterfeit, or attempts to sell under a license which has expired or has been revoked or cancelled, or which has not been issued or transferred to

him, or has in his possession another's license with intent to use the same, shall be punished by a fine of not more than one thousand dollars.

16. Assistance. The secretary of state and the state treasurer are authorized to employ such assistance and to incur such expense for the administration of this act as the governor and council may approve, and the governor is authorized to draw his warrant therefor.

[fol. 14] 2. Takes Effect. This act shall take effect upon its passage.

[Approved April 14, 1931.]

Louis D. Ratta, by His Attorneys, Demond, Woodworth, Sulloway and Rogers.

November 24, 1931.

Within motion allowed.

George F. Morris, U. S. District Judge.

In United States District Court

Defendant's Motion to Dismiss and Answer—Filed December 28, 1931

Now comes the defendant, Michael J. Healy, Chief of Police of Manchester, New Hampshire, and moves that the above entitled bill in equity be dismissed because this case does not really and substantially involve a dispute or controversy properly in the jurisdiction of this court.

1. Because the value of the subject matter is not alleged to and does not exceed the sum of three thousand dollars.

2. Because the plaintiff has a plain, adequate and complete remedy at law.

3. Because of a want of jurisdiction in equity.

And in further answer:

1. The defendant admits the allegations contained in paragraph one.

2. The defendant admits the allegations contained in paragraph two.

3. The defendant denies the allegations contained in paragraph three.

4. The defendant admits the allegations contained in paragraph four.

[fol. 15] 5. The defendant admits the allegations contained in paragraph five.

6. The defendant denies each and every allegation contained in paragraph six and further denies that chapter 102 of the laws of 1931 of the State of New Hampshire, entitled "An Act Relating to Hawkers and Peddlers," is in contravention of the state and federal constitutions and therefore void.

7. The defendant denies the allegations contained in paragraph seven.

8. The defendant further states in answer that chapter 102 of the Laws of 1931 of the State of New Hampshire entitled "An Act Relating to Hawkers and Peddlers" is consistent in whole and/or in part with the constitutions of the United States and the State of New Hampshire; that the exceptions set forth in section three of said act are reasonable and just; but that if said section, in whole or in part, is unreasonable, arbitrary and discriminatory it is severable, in whole and/or in part, from the remainder of said act; that said section plainly is but a detail and not an essential part of said act; that said section therefore is separable and severable from the balance of said act without affecting the substantial accomplishment of the purpose for which said act was passed; and that even if said section, or any part thereof, is unconstitutional it therefore does not invalidate the remainder of said act but merely renders nugatory that portion of the act.

9. That the provisions of section 5 of said act, requiring the applicant to procure a certificate of character from the local town or city officers as a prerequisite to his obtaining a license from the secretary of state, does not place an unjust burden upon the plaintiff because such requirement is a reasonable regulation for the protection of the public in the exercise of the police power of the State of New Hampshire; and since the purpose of said certificate is to prevent such persons from being licensed as would abuse

the privilege and would engage in dishonest, unfair and fraudulant practices in pursuance of their trade as hawkers and peddlers.

10. That the provisions of sections 7 and 8 of said statute, which require applicants and licensees to pay certain fees, are just and reasonable; but that if said sections, in whole or in part, are unreasonable, arbitrary and discriminatory they are severable, in whole and/or in part, from the remainder of said act; that said sections plainly are but a detail and not an essential part of said act; that said sections therefore are separable and severable from the bal-[fol. 16]-ance of said act without affecting the substantial accomplishment of the purpose for which said act was passed; and that even if said sections, or any part thereof, are unconstitutional they therefore do not invalidate the remainder of said act but merely render nugatory that portion of the act.

11. That section 11 of said act, which exempts from payment of license fees but not from obtaining a license, soldiers and sailors disabled in war and their widows and citizens of this state over seventy years of age, provides reasonable and just classifications and exemptions; that the plaintiff does not belong to any of said classes and therefore is not prejudiced by the enforcement, administration or operation of said section; that as to the plaintiff it is therefore immaterial whether said section discriminates against persons and classes other than those mentioned and established in said section or denies other persons equal protection of the law inasmuch as the plaintiff has no interest affected by the enforcement of said section; that only seven licenses have been issued by the secretary of state of New Hampshire to persons over seventy years of age; and that said section is of comparative little importance.

That if said section, in whole or in part, is unreasonable, arbitrary and discriminatory and if the plaintiff is permitted to champion the grievances of members of the classes established by said section whether or not the plaintiff is a member of any of said classes, said section is severable, in whole and/or in part, from the remainder of said act; that said section plainly is but a detail and not an essential part of said act and is separable and severable from the balance of said act without affecting the substantial

accomplishment of the purpose for which said act was passed; and that even if said section, or any part thereof, is unconstitutional it therefore does not invalidate the remainder of said act but merely renders nugatory that portion of the act.

12. That the plaintiff and the Air-Way Company, for whom the plaintiff is employed as a distributor, and their agents have not paid the fee or secured the license to become hawkers and peddlers under the act; whereas in truth and in fact said plaintiff and all his agents are hawkers and peddlers within the meaning of said act and should therefore be licensed and pay the statutory fee for said licenses; that said plaintiff does not therefore come into your honorable court with clean hands.

13. That said plaintiff is not engaged in the business of a hawker and peddler within the terms of said act and has never been threatened with prosecution for violation of [fol. 17] said act; nor has your defendant ever attempted to enforce the provisions of said act against said plaintiff; that said plaintiff's rights therefore are not directly and certainly unfavorably affected nor in any way prejudiced by said act.

14. That said plaintiff does not belong to any of said classes alleged to be discriminated against and that said act cannot deny plaintiff equal rights, privileges and immunities as a member of said classes and that as to said plaintiff the entire act and any and/or all of its provisions are immaterial.

Wherefore the defendant prays that this bill may be dismissed.

Michael J. Healy, by His Attorney, Thornton Lorimer, Assistant Attorney-General.

I certify that I have this day sent a copy of this answer to Demond, Woodworth, Sulloway and Rogers, attorneys for the petitioner.

Thornton Lorimer.

December 28, 1931.

STATE OF NEW HAMPSHIRE,
Merrimack, ss:

——, 1931.

Subscribed and sworn to this 28th day of December, 1931. Before me,

J. Blanche Newhall, Justice of the Peace.

In United States District Court

Amendment to Bill of Complaint—Filed January 23, 1932

It is hereby agreed that the above entitled bill in equity may be amended by inserting at the end of paragraph 5 a new paragraph 5a as follows:

[fol. 18] That the complainant's profits on his New Hampshire business prior to the passage of the statute set forth in paragraph 2a of the bill of complaint as amended, amounted to in excess of three thousand dollars ($3,000); that his loss of business due to the enforcement of said statute already exceeds three thousand dollars ($3,000); that unless he obtains the relief prayed for in this petition, his loss on account of the enforcement of this provision by the respondent will exceed three thousand dollars ($3,000); that this controversy involves in excess of three thousand dollars ($3,000), exclusive of interests and costs.

Demond, Woodworth, Sulloway and Rogers, Attorneys for the Complainant. Thornton Lorimer, Assistant Attorney-General, for the Respondent.

[fol. 19] In United States District Court

Opinion—Filed November 3, 1932

Before Bingham, C. J., Morris and Letts, D. JJ.

Letts, J.:

This is a bill in equity brought by Louis D. Ratta, a resident of Springfield, Massachusetts, to enjoin the Chief of Police of the City of Manchester, New Hampshire, from interfering with canvassers employed in selling vacuum cleaners from house to house in Manchester. The action calls in question the constitutionality of the New Hampshire "hawkers and peddlers" statute.

The complainant, whose home office is in the City of Springfield, purchases under contract from the manufacturer a certain household vacuum cleaner and has for his territory for distribution the States of New Hampshire, Vermont and part of Massachusetts. His method of selling has been that of employing canvassers on a commission basis who sell from house to house delivering the utensil then and there, if sold. In the City of Manchester the respondent has undertaken to prevent the complainant's canvassers from selling the article in the manner described unless and until such canvassers obtain licenses under the New Hampshire act relating to "hawkers and peddlers."

Sections 2 and 3 of the act provide as follows:

"2. Prohibition; Penalty. No hawker or peddler shall sell or barter or carry for sale or barter, or expose therefor, any goods, wares or merchandise, unless he holds a license so to do as here provided. Any person violating this section shall be fined not more than two hundred dollars, to be equally divided between the state and the town in which the offense was committed. Such sums as may be paid into the state treasury as penalties shall be credited to the secretary of state for his use in the enforcement of this chapter.

3. Exceptions. The provisions of this chapter relating to hawkers and peddlers shall not apply to wholesalers or jobbers selling to dealers only, nor to commercial agents or other persons selling by sample, lists, or catalogues, nor [fol. 20] to any person selling provisions, agricultural implements, fruit trees, vines, shrubs, books, newspapers, pamphlets, the products of his own labor or the labor of his family and the product of his own farm or the one which he tills, the manufacturers of furniture and ladders excepted."

Sections 7 and 8 fix the amount of the license fee required and make provision for both local and state-wide licenses, limiting the duration thereof to one year.

Section 11 provides as follows:

"11. Persons Exempt. Any soldier or sailor disabled in any war in which the United States has been engaged, or by sickness or disability contracted therein or since his discharge from the service because of such service, and the widow of any such soldier or sailor so long as she remains

unmarried, or any citizen of this state over seventy years of age, shall be exempt from paying the license fees required by this chapter."

The complainant contends that the entire statute is unconsitutional because of contravening provisions of Article IV Section 2, of the Constitution of the United States and Article XIV of the Amendments thereto.

The respondent at the outset has challenged the jurisdiction of this Court, first, on the ground that the amount in controversy is insufficient to vest jurisdiction because of diversity of citizenship and, second, for lack of jurisdiction in equity. It is contended that individual canvassers would have an adequate remedy at law in the opportunity to raise the constitutional questions here presented by way of defense in event of prosection under the act. It is unnecessary to here indulge in an extended labor of either of these points. The evidence establishes that there is a threatened interference with the complainant's business wherein property rights are involved. It is well established that equity has jurisdiction under such circumstances to enjoin the prosecution of a criminal suit if the act under which such prosecution be threatened is unconstitutional.

Terrace v. Thompson, 263 U. S., 197, 214, 215.
Packard v. Banton, 264 U. S. 140.

It is also well settled that in determining whether there be involved the necessary jurisdictional amount of three [fol. 21] thousand dollars, exclusive of interest and costs, any recurring or continuing expense should be capitalized.

Western & Atlantic R. R. v. Railroad Commission, 261 U. S. 264, 267.
Packard v. Banton, 264 U. S. 140, 141, supra.

In this case it is clear from the testimony that an enforcement of the provisions of the act, by requiring the individual canvassers to take out licenses and pay the fees provided under the statute, would confront the complainant with the alternative of either abandoning his business as now carried on in the City of Manchester or himself assuming the burden of paying the license fees for many, if not most, of those employed. The testimony establishes that many of these men are without adequate means or would be reluctant to undertake the employment if the license fee by them had to be paid.

The abandonment of the complainant's business would clearly involve property rights of a value in excess of the jurisdictional amount and were he to pay the license fees in order to continue his business it would entail an expenditure of at least three hundred dollars per year which, if capitalized at five per cent, would amount to six thousand dollars.

There alone remains for consideration the question of the constitutionality of the legislation. This must be examined from the point of view of its validity as an exercise of the police power and not as a revenue or tax measure.

State v. Express Company, 60 N. H. 219.

We are not concerned with the general question of the right of the state to require all itinerant vendors under reasonable restrictions and regulations to be licensed. It is well settled that the state may assert such authority where such regulation involves no discrimination as between individuals or the origin of the merchandise to be sold. In the case of Emert v. Missouri, 156 U. S. 296, Mr. Justice Gray, although dealing specifically with the application of the commerce clause, reviews historically the assertion and recognition of this power. The question before us is whether the New Hampshire statute is void because of the discriminatory character of certain of its provisions.

Two sections or clauses of the Constitution of the United States restrict the power of the states to discriminate in the application of the so called police power. The first of these is Section 2 of Article IV of the original Constitution. It declares "the citizens of each state shall be entitled to [fol. 22] all privileges and immunities of the citizens in the several states." This provision restricts the state (except under special circumstances) from discriminating against the citizens of a sister state in favor of its own citizens.* The Supreme Court of New Hampshire has over a long period consistently applied this constitutional principle in respect to legislation in that state. In the case of State v. Lancaster (1884), 63 N. H. 267, 270, the court held that a statute requiring citizens of other states to procure a license to sell trees, shrubs, etc. which could be sold by the citizens of New Hampshire without a license was in conflict

* This interpretation is qualified when applied to foreign corporations.

with Article IV, Section 2, of the Constitution of the United States and again in the case of State v. Wiggin (1888), 64 N. H. 508, the court had before it a statute relating to licenses for the sale of lightning rods. This statute required the payment of a fee of five hundred dollars by citizens of other states while permitting such license to be granted for a fee of one hundred dollars to one who had been a citizen of New Hampshire for five years. In a brief opinion by Bingham, J., he concluded "and in this respect the citizens of other states are not given the privileges and immunities of citizens of this state," holding that the act was in violation of Article IV, Section 2.

See also Commonwealth v. Hana, 195 Mass. 262.

In the present case the provisions of the New Hampshire "hawkers and peddlers" statute discriminate in favor of citizens of New Hampshire in but one respect. Section 11 entitled "Persons Exempt" provides "or any citizen of this state over seventy years of age." Under this provision a citizen of New Hampshire if seventy years of age, can sell merchandise as a canvasser or peddler within the state of New Hampshire without paying a license fee, whereas a citizen of any other state, of the same age, would be unable to do so. While this particular provision of the act is seemingly of no great practical importance as few persons of that age would be engaging in such employment, it does nevertheless encroach upon the clear prohibition of Article IV, Section 2. The Constitution in respect to safeguarding the equality of privileges and immunities between citizens of the several states does not recognize or permit of any encroachment predicated upon such a basis or excuse.

The second provision of the Constitution against discrimination in the exercise of the police power by a state is to be found in Section 1 of the XIVth Amendment:

[fol. 23] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The provisions of the above quoted section, in so far as they relate to the abridgement of the privileges or im-

munities of citizens and the provision containing the due process clause, apply to all, wherever domiciled. The equal protection clause, however, relates only to persons within the jurisdiction of the given state. In the present case, as the complainant is a resident of the State of Massachusetts it would seem that the only provisions of Section 1 of this Amendment which he can invoke in challenging the constitutionality of the statute are the due process clause and the privileges and immunities clause. By the standard of these two clauses, we will consider the provisions of Section 3 of the New Hampshire act and the further exemptions included in Section 11.

No useful purpose would be served by undertaking to define privileges and immunities as used in that clause of the Amendment or in distingishing the scope of application of that clause from the due process clause. They are supplemental provisions overlapping and interrelated. The clear intendment of Section 1 of the Amendment is to protect persons in the enjoyment of those rights which by long usage and custom have come to be looked upon as fundamental, and to safeguard them against unreasonable and arbitrary invasion by state action. The Supreme Court has on numerous occasions refrained from dissecting Section 1 into separate inhibitions and has looked upon the section as an intrasupplementing whole.

In the case of Duncan v. Missouri, 152 U. S. 377, 382, the court said:

"But the privileges and immunities of citizens of the United States, protected by the Fourteenth Amendment, are privileges and immunities arising out of the nature and essential character of the Federal government, and granted or secured by the Constitution; and due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government; * * *"

Again in the case of Giozza v. Tiernan, 148 U. S. 657, Mr. Chief Justice Fuller, speaking for the court, in part said:

[fol. 24] "The amendment does not take from the States those powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids

any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; * * *. And due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

In the case of Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 559, the court, in reaffirming the doctrine of an earlier decision (Barbier v. Connolly, 113 U. S. 27) said:

"We have also said: "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."

A specific application of these principles was made by the Illinois Supreme Court in the case of Marallis, et al, v. City of Chicago, et al, June 24, 1932, reported in "The United States Daily" July 13, 1932. The court held an act of the legislature to be unconstitutional which would exempt from obtaining a hawkers and peddlers license all former soldiers and sailors of the United States who had been honorably discharged from service. The court, in an extended opinion wherein are assembled numerous authorities, observed in respect to the attempted classification:

"The soldier, or sailor, after his discharge, returned to civil life, became a part of the community in which he lived [fol. 25] and enjoyed the same rights and was subjected to the same burdens as other citizens similarly circumstanced legally in the same jurisdiction."

See also recent case Fuller Brush Co. v. Town of Green River, 60 Fed. (2d) 613.

In examining the act now before us we find it replete with the most arbitrary of attempted classifications and exemptions. Under the provisions of Section 3 of the act the itinerant canvasser may sell from house to house any kind of merchandise without a license if he uses only a sample or catalogue, making the delivery on another occasion; but if he sells an article not included among those exempt, such as a vacuum cleaner, and delivers at the time the very utensil which has been demonstrated to the customer, it is necessary for him to obtain a peddlers license. Without a license one may peddle provisions which would presumably include food stuffs and groceries but may not without a license sell and deliver at the time bathroom fixtures, tooth brushes or combs. He may without a license, as provided in Paragraph 3, peddle fruit trees, vines and shrubs, but to peddle fir trees, onion sets or annual plants for the garden, if not the product of his own farm, he must have a license. One may by his own labor, or that of his family, make wheelbarrows and hand sleds and vend them without a license but to peddle a porch chair or ladder a license must first be obtained. One may make children's toys or other articles and sell them without restriction but if he were to purchase the same class of articles from a neighbor he could not peddle them unlicensed.

Under the provisions of Paragraph 11 of the act, not exempting from the necessity of obtaining a license but providing exemptions from the necessity of paying a fee for the license, we find that the widow of a soldier or sailor need pay no fee but that a widow of a mechanic would be required to pay the exaction. The citizen of New Hampshire, seventy years of age, is required to pay no fee but the citizen of Massachusetts desiring to peddle in New Hampshire, though more than seventy years of age, must pay the license fee as well as the individual sixty-nine years

of age wherever he may chance to reside. These suffice to illustrate the wholly unreasonable and arbitrary character of the classifications attempted under the provisions of both Paragraph 3 and Paragraph 11 of the statute. They bear no relation whatever to the proper object or subject matter of such legislation, namely, the protection of the [fol. 26] public. They result in an arbitrary and unequal application of restrictions to persons in legal status similarly circumstanced.

There is in respect to this legislation no occasion to apply the doctrine that if different sections of a statute are independent of each other that which is unconstitutional may be disregarded and unobjectionable provisions enforced. To invoke that principle here, would necessitate striking out Sections 3 and 11 wherein the legislature has specifically expressed an intent that certain classes of persons shall not be required to pay a fee and in Section 3 that persons selling certain classes of merchandise shall not be required to obtain a license. This court cannot disregard these sections without the resulting effect of imposing the burden of obtaining licenses and the burden of paying fees upon certain classes that the legislature has declared shall not be required so to do. The result is that the statute must be regarded as an entirety and in that view must be adjudged to be unconstitutional and therefore void.

Consistent with these conclusions, the prayer of the complainant will be sustained. Findings, conclusions and a decree may be submitted for settlement and entry, including an award of costs to the complainant and reserving to the respondent his proper exceptions.

IN UNITED STATES DISTRICT COURT

FINAL DECREE—Filed and Entered November 29, 1932

This cause having come on for hearing before Bingham, C. J. and Morris and Letts, D. JJ. on the fourteenth day of June, 1932; and it appearing to the Court that the allegations of the plaintiff's petition are true; that the New Hampshire "Hawkers' and Peddlers'" statute, so-called, referred to in the petition and being Chapter 102 of the Session Laws of New Hampshire, of 1931, is unconstitu-

tional; that it is in contravention of the provisions of Section 2 of Article IV of the Constitution of the United States, and denies the plaintiff the immunities and privileges allowed to citizens of the State of New Hampshire; that it is in contravention of the provisions of the Fourteenth Amendment of the Constitution of the United States and deprives the plaintiff of his property without due [fol. 27] process of law; and that justice requires that the prayers of the petition be granted, it is thereupon ordered, adjudged and decreed

(1) That the defendant and all other police officers of the City of Manchester working with and under him be restrained and enjoined from arresting or prosecuting and/or threatening to arrest or prosecute or otherwise interfering with the plaintiff and/or his dealers or any of them on account of or in connection with the prosecution by the plaintiff and/or his dealers or any of them of the business of selling by canvassing from house to house Air-Way Sanitary Systems, parts, accessories and supplies therefor, or otherwise attempting to enforce the provisions of Chapter 102 of the 1931 Laws of New Hampshire or any portion thereof against the plaintiff and/or any of his said dealers: and

(2) That the complainant recover from the respondent his costs, to be taxed by the Clerk of Court.

George H. Bingham, C. J.; George F. Morris, D. J.; Ira Lloyd Letts, D. J.

A true record.

Attest: Thomas B. Donnelly, Clerk.

[fol. 28] APPENDIX A

IN UNITED STATES DISTRICT COURT

Stipulation as to Evidence for Record on Appeal

It is hereby stipulated and agreed by the above parties that the evidence of the testimony at the hearing in the United States District Court for the District of New Hampshire on June 14, 1932 is as follows:

At the opening of the trial petitioner's counsel stated in accordance with his understanding with counsel for the respondent:

"The only issue of fact between the parties to this petition relates to the question of whether the jurisdictional amount of $3,000 is involved in this case. The petitioner's claim that $3,000 is involved is based on two propositions: That losses either have or will shortly amount to the jurisdictional amount and that this statute goes on forever, theoretically—that substantial losses can be shown whereby the value of the business will be substantially lessened and that these losses are due to police activities.

"We will introduce evidence this morning on the issue of whether the police activities have interfered with our conduct of the business, so as to account for the losses and either by depositions or an agreement we will submit a statement as to what our actual losses have been, after the close of the hearing and within a few days. There is no agreement between the parties on the question of law involved and both sides will submit written arguments."

Louis D. Ratta testified on direct examination that he was a resident of Springfield, Mass., and distributor under contract of the Air-Way Sanitary System with headquarters at Springfield, Mass. His territory consisted of the states of New Hampshire, Vermont and western Massachusetts. The goods are billed to him at a specific price and he hires his own agents. Manchester was the main office for the New Hampshire territory and was managed by Arnold T. Clements. In May and June, 1931 his business suffered a slump, the reason being the enforcement of the hawkers and peddlers law against the agents whereby they had to get a license or sell by sample and deliver at a future date. Mr. Ratta has been unable to get any of his men to take out a license. There was a tremendous turnover in his help. A number of inexperienced men refused to become salesmen because it would cost them fifty dollars for a license and those who accepted employment lost a lot of sales because they found in many cases when they returned to make delivery that the customer had changed her mind. [fol. 29] The fifty dollar license fee is necessary because a local license is impractical as a man does not sell in any one locality, but follows leads given to him by customers

which carry him to many different towns so that a state license is necessary. Prior to the enforcement of the hawkers and peddlers law the dealers left with the customer the machine used for demonstration. After the enforcement of this law the agents sold by sample, making the delivery at a future date or left the vacuum cleaner with the customer as security for the future delivery of another vacuum cleaner in two or three days. The agents ran into sales resistance under this system because of difficulty in taking old machines in trade, because the customer did not wish to be without any cleaning apparatus pending delivery and because they demonstrated one machine and had to deliver another—some people see a system work and wish to purchase it and object to the shipping of another system feeling that it might not be up to the standard of the demonstrated sample. Experienced salesmen are accustomed to make deliveries on a one call system. This new system seemed to them to require duplicate time to complete a sale and they are not interested. Mr. Ratta has not been able to employ any agents willing to purchase a license—all that he could employ as agents were men without experience who had been out of work for a long time, men that were desperate, who would try to sell his product. During 1931 and 1932 the Vermont business showed a profit. The Massachusetts business carried along fairly well. The Massachusetts and Vermont business during 1931 and 1932 has held up to the average production before, whereas in New Hampshire and in Manchester during this period the business decreased. The results of the business in Ratta's entire territory during the first half of 1931 showed losses of thirteen hundred dollars and for the second half of 1931 a loss of forty-seven hundred dollars and during that time Massachusetts and Vermont at least held their own. Ratta knows of nothing else except the enforcement of this act to cause the loss. He did not have the right manager in Manchester—he was all right under the old system but was not strong enough to hire men under the new system and even lost the older men—and changed about the first or middle of December 1931. The situation in Manchester affected his business elsewhere because he trained and hired all his men for New Hampshire at the Manchester office and not having the proper number of men functioning in Manchester it seemed to break down the morale of new

men who knew nothing about the business and did not see the older men getting the business they had in previous [fol. 30] years—"because they talked in the office or had sales meetings." He transferred four men to Vermont from the New Hampshire district during the last year or so because in Vermont the men would not be bothered by the hawkers and peddlers law and could make their deliveries contemporaneous with the sales. These four men came from the northern part of New Hampshire. Ratta tried to induce these men to remain in New Hampshire but they got to the point where they didn't have money to carry on their business. They have done very well in Vermont and have been working in Vermont since the first of last October. Ratta has had eighteen years' experience selling from house to house and states as his opinion that a man cannot sell as effectively when he cannot sell the article demonstrated but must arrange for subsequent delivery of another similar article. The selling crews cannot produce as much selling by sample as they can by selling the article demonstrated.

On cross examination Ratta testified that his dealers went from house to house and from town to town canvassing and demonstrating. He was thirty-nine years old and not a war veteran. Before this bill in equity was brought Ratta had approximately thirty-two to thirty-five men working at the Manchester office at one time last year and at the time of the filing of the bill approximately a dozen were employed selling from house to house in the city of Manchester. The hawkers and peddlers act went into effect on April 14, 1931. The complainant did not have his men licensed under the old act nor had any official asked Ratta to have his men licensed. At the date of the hearing Ratta had six Manchester residents working in the Manchester office operating under the new plan of selling. Ratta was sure that the volume of sales from January 1, 1931 to June 1, 1931 was more than the volume of sales for the same period in 1932. Ratta did not wholly attribute his loss of business in New Hampshire to the business depression. He said the business was there but he had not been able to get it because he had not been able to get the men to go and get the business—"the business has been there, but we haven't been able to get it." Some of the loss of business is attributed to present business conditions but Ratta

did not know exactly how much. He had tried to have his agents licensed but they could not afford to pay the fee. Neither he nor the Air-way people could buy licenses for the men because the turnover is so great—he could not buy a license for a man that had never sold a thing, not knowing whether he is going to like the business or make good—he could not spend fifty dollars for a license not knowing [fol. 31] whether the man would be successful. His business suffered a loss of practically five thousand dollars during the last six months of 1931 and up to the date of hearing in 1932 and about one-third of this loss—fifteen hundred dollars, sixteen hundred dollars—was attributed to the loss of sales in Manchester. He stated that it would not have paid him to have taken out licenses for the six men in Manchester instead of losing fifteen hundred dollars. He would have lost the money—the Air-Way loaned the money to him—he could not have borrowed it to gamble in such a way. The six men who had dropped from the Manchester list of agents had not been very successful but they did sell a few systems. They did not make enough money for Ratta to warrant buying them a license. If the six men had remained the first six months' profits probably would not have continued under the new plan of selling. Ratta's personal profits on each system were less than one dollar but he could not say just how much. His gross profits were seven dollars a system but road expenses, office, telephone, office equipment, telegrams and stenographers had to come out of that and this overhead fluctuates. He could not say how many units were sold in Manchester in 1931 nor how much his agents sold during that year but his records would show. (By agreement with counsel stated in court these records were to be introduced by affidavit.) Ratta's business was to direct, manage and supervise throughout his field, holding sales meetings, interviewing men, going out and canvassing and selling machines. The Air-Way Company financed him in his business and he worked under a contract with them and partially under their supervision. He was hired by one of the company's executives who could also fire him. He blames his necessity to change managers in Manchester onto the hawkers and peddlers law, he got along under the old method of doing business but could not carry it on under the new policy, could not get the men to operate properly, he and they were weeping

on each other's shoulders, but he is a good enough man so that he is still with Mr. Ratta in another capacity. He stated he might have had to change his manager even though licenses were taken out and thus permitting his agents to continue doing business in the old way of making deliveries on demonstration because he could not sell the idea to the agents and spend fifty dollars apiece on them without knowing that they were going to make good. All of the New Hampshire business is done from the Manchester office. Ratta is an American citizen. His agents all have to be bonded by a surety company and each agent has to give his last occupation, where he has worked for five [fol. 32] years, four references where he has never worked and unless these references are satisfactory he cannot continue in the employ. The four men who went to Vermont from the northern part of New Hampshire would not pay a fifty dollar license fee although Ratta paid them pretty good checks. They left because they wanted to make deliveries at the time of demonstration and did not like to sell by sample. One of them lost his first two sales under the new method. The machines were shipped to the customer and both were rejected because the customer did not have the down payment. Chief Healy of Manchester said that Ratta's agents would have to have a license to operate in Manchester.

On redirect examination Ratta stated that the profit made on a machine varies and depends largely on the volume of business—that he had a regular overhead in New Hampshire (the expense of the Manchester office) regardless of the volume of business done and that that overhead would remain general.

Arthur T. Clements on direct examination testified that he lived in Manchester, New Hampshire. He was sales manager of the Manchester office for Louis D. Ratta. It was his job to employ salesmen. He had experience as a house to house salesman for eleven years and came to work for Mr. Ratta two years and four months ago and to the Manchester office in December 1931. He had seventeen salesmen in Manchester at the date of hearing and had employed twenty-six since he had been in Manchester who had since left the employ. He had been able to hire about one out of four or five applicants. He stated that the hawkers and peddlers law as enforced tremendously affected his

ability to hire salesmen because a real salesman prefers to deliver on the spot—because otherwise the customer may change her mind pending delivery and would cool off whereas after she had accepted delivery and used the machine she would become enthusiastic. On telling applicants for jobs that they would either have to sell by sample or take out a license they wouldn't consider the proposition at all. They are interested until he tells them the plan and then they are not interested. He has not as many salesmen in Manchester as he wishes and has been trying to get more.

On cross examination he stated that since he had been in Manchester business was just about the same as before. In the city of Manchester alone the volume of sales was probably twenty-five per cent in the last six months of 1931 compared to the volume done in the first six months of the same year. He was in charge of the Manchester office since the first of December 1931. For the six months [fol. 33] ending with June 1, 1932 the figures show a large loss in net revenue due to increased overhead, trying to get new men, increased telephone calls, advertising costs and road expenses to keep the men enthused or keep them on. It would be impossible to pay the fifty dollar license fee because the turnover in salesmen is so great. He had been able to hire and train more men than his predecessor but because of the enforcement of the act by the police he had been unable to make the men go out and do the job. He had never been in trouble with the police and would know of his men ever being in trouble. He had tried to hire the best type of men. He was personally employed by and works for Louis D. Ratta and not the Air-Way Company. Business conditions in Manchester on the class of stuff that he sells is very good. There are men who work under ideal business conditions that he can sell to. The depression affects salesmen to the extent that talk of it demoralizes them but the class of customers with whom he deals—he can sell to.

Thornton Lorimer, Attorney for the Appellant.
Demond, Woodworth, Sullowav & Rogers, Attorneys for the Appellee.

In United States District Court

Affidavit of Louis D. Ratta

I, Louis D. Ratta, plaintiff in the above entitled action, on oath depose and say that I have turned over to Frank J. Haessler and he has had access to, all the books and records relating to the conduct of my business, and the books and records accurately reflect the financial transactions relating to my said business except that no account is made of various sums disbursed by me from time to time by way of so-called loans and prizes to assist discouraged dealers and to stimulate sales; that my books and records do not show a distribution or allocation of telephone and traveling expense items to any particular district or territory (except that no such items in any substantial amount can be attributed to the Massachusetts business) so that it is impossible to apportion or allocate such expenses so as to show with any degree of accuracy the amount of these expenses or the amount of net profits or losses to be fairly allocated to any particular district or territory; that prior to the middle of 1931, as aforesaid, it was my regular prac- [fol. 34] tice to make a swing through my whole territory by automobile on an average of once a month; that such trip would involve travel to Manchester, some time spent there with the local manager and with the various dealers working under him, and a trip through the northern part of New Hampshire, calling on various dealers; that from there I would continue on into Vermont, confer with my local manager there and with various dealers working under him, and return to my home office at Springfield, Massachusetts; that since the middle of 1931, as aforesaid, my New Hampshire business has engaged a very much larger part of my attention to the extent that I have been unable to give the proper attention to my Massachusetts business; that I have still continued to make my monthly trips through my New Hampshire and Vermont territory, as theretofore, but in addition I have had to make two or three (and not less than two) additional trips each month to New Hampshire, in order to keep my dealers and hold my business in New Hampshire; that most of these additional trips have been to Manchester and have not included other portions of the State; that instead of spending a portion of a day in Manchester and with the Manchester deal-

ers, as formerly, I have had to spend from one to two days with the Manchester dealers on these trips; that these additional trips to Manchester have been due to the fact that it has taken additional effort, time and energy and expense to keep the dealers satisfied and to keep them from throwing up their jobs under the new selling conditions necessitated by reason of the attempt of the local authorities to enforce the New Hampshire Hawkers and Peddlers Act, so-called; that it has been necessary to continually and repeatedly assure them that so long as they continued to sell by sample they would not be arrested, and to hold frequent meetings, which always involve dinner expense, to reassure the men and encourage them, and it has often been necessary to advance to various dealers small sums of money for gasoline or other current expenses to enable them to continue operations, and to keep them on the job; that until the filing of this bill in equity on November 4, 1931, I was unable to get any assurance from the local authorities that the sale by sample method of doing business, approved by the State authorities when said bill was filed and pending this action, would be accepted by the local authorities as a compliance with the statute, and it was only as a result of very extensive effort and expense on my part that I was able to keep my organization together; that since that time I have still found it necessary to make said additional trips to Manchester in order to keep up production; that said ad-
[fol. 35] ditional trips vary somewhat is expense according to the length of time which I have to spend with my said New Hampshire dealers; that with one or two exceptions where it has been necessary to spend only a short time in Manchester, said additional trips have cost me, including gasoline and oil, but not including anything for mileage on my automobile, not less than $35.00 a trip; that there has also been additional managerial expense properly attributable to the Manchester territory on account of the fact that I had to employ a new manager (the Mr. Clement who testified) on account of the disturbed situation in New Hampshire; that from November, 1931, to June 1, 1932, I was able to employ him on a commission basis with a minimum guarantee of $25.00 a week, which involved some additional cost over the cost of my former manager; that in order to retain his services I had to make a new arrangement with him on June 1, 1932, which in-

volves the payment to him of a straight salary of $200.00 a month, in addition to which I have to pay for gasoline and oil which he uses in connection with the business; that Mr. Smith (Mr. Clement's predecessor) was local manager in Manchester during the months of November and December, 1930, and through the month of October, 1931; that his earnings as local manager, during November and December, 1930, totalled $68.00 and averaged $7.73 a week, during the first six months of 1931 totalled $522.00 and averaged $20.08 a week and during the months of July, August, September and October 1931 totalled $96.00 and averaged $5.41 a week, so that there has been and will continue to be a very substantial additional managerial expense on account of the necessity of employing a more capable Manchester manager to handle the disturbed situation there arising out of the activities of the local authorities with reference to the so-called Hawkers and Peddlers Act.

Louis D. Ratta.

Concord, N. H., June 29, 1932.

State of New Hampshire,
Merrimack, ss:

Personally appeared Louis D. Ratta and made oath that the foregoing affidavit by him subscribed is true, before me,

Jonathan Piper, Notary Public. (Seal.)

[fol. 36] In United States District Court

Affidavit of Frank J. Haessler

I, Frank J. Haessler, of New Haven, Connecticut, on oath depose and say that I have been actively employed as an accountant and auditor since 1916; that I have just completed an examination of the records of the transactions of Louis D. Ratta, doing business under the name of Air-Way Branch of Springfield (formerly Air-Way Branch of Manchester, New Hampshire), from July 1, 1929 to June 11, 1932; that the annexed schedules are taken from said records and correctly reflect the situation as shown thereby; that said business transactions include sales of parts, etc. which do not involve solicitation by canvassers, and these have been ex-

cluded in arriving at the results shown in said schedules; that this particularly affects schedule 1 in that the net loss on all business, including these non-canvassing sales, for the first half of 1931, amounted to $1,339.04, and for the last half of 1931 to $4,702.60; that said books and records do not show a distribution or allocation of telephone and travelling expense items to any particular district or territory (except that no such items in any substantial amount can be attributed to the Massachusetts business) so that it is impossible to apportion or allocate such expenses to show the amount of these expenses or the amount of net profits or losses to be fairly allocated to any particular district or territory; that it is impossible to show the gross sales, expenses and net profits for the various districts or territories during any portion of 1932, or to show the gross profits, expenses and net profits beyond the first four months of 1932, until the books are balanced as of June 30, 1932.

Frank J. Haessler.

Concord, June 29, 1932.

STATE OF NEW HAMPSHIRE,
Merrimack, ss:

Personally appeared Frank J. Haessler and made oath that the above affidavit by him subscribed is true,
Before me,

Jonathan Piper, Notary Public. (Seal.)

[fol. 37]

Schedule I

(Comparison of Gross Sales, Expenses and Profits, Excluding Sales of Parts, Etc., Which Do Not Involve Canvassing)

Period	Territory	Gross sales	Expense incl. mdse. cost	Net profits
Last half 1929	N. H. and Vt	$92,051.41	$81,046.84	$11,004.57
1930	Manchester	11,044.50		
"	Bal. of N. H	78,676.50		
"	Vermont	63,919.88		
"	Massachusetts	12,090.35		
	Whole Territory	165,731.23	155,346.93	10,384.30
First half 1931	Manchester	1,902.60		
"	Bal. of N. H	26,054.80		
"	Vermont	26,195.10		
"	Massachusetts	12,822.90		
	Whole Territory	66,975.40	67,603.06	*627.66
Last half 1931	Manchester	1,929.05		
"	Bal. of N. H	11,948.55		
"	Vermont	18,216.50		
"	Massachusetts	3,028.42		
	Whole Territory	35,122.52	40,273.45	*5,150.93

NOTE: The records are not kept in such a way as to show the allocation of various expense items so as to enable any accurate determination of the net profits for any particular district or territory. Gross sales, expenses, and net profits for the whole territory for the first four months of 1932 only are shown because it is impossible to allocate any of these items to any particular district at this time and impossible to go beyond April 30 until the books are balanced as of June 30, 1932.

* Loss.

[fol. 38] Schedule II

(Average Number of Dealers and Average Production of Dealers)

Period	Territory	Average No. dealers	Average gross sales per dealer
1930	Manchester	19	$581.24
"	Bal. of N. H	54	349.30
"	Vermont	70	913.14
"	Massachusetts	39	310.00
First half			
1931	Manchester	6	312.10
"	Bal. of N. H	27	964.96
"	Vermont	33	884.70
"	Massachusetts	29	442.17
Last half			
1931	Manchester	6	321.50
"	Bal. of N. H	22	543.11
"	Vermont	30	607.21
"	Massachusetts	12	252.37
1/1/32 to 4/30/32	Whole territory	72	602.13

NOTE: See note to schedule I.

[fol. 39] Schedule III

(Comparative Earnings of Four Men Transferred to Vermont by Request, See Record, p. 14)

	Period	Territory	Gross sales
C. A. Dorman	First half		
	1931	New Hampshire	$241.55
	"	Vermont	924.35
	Last half		
	1931	New Hampshire	.....
	"	Vermont	639.75
G. J. Pillotte	First half		
	1931	New Hampshire	2,608.65
	"	Vermont	1,409.80
	Last half		
	1931	New Hampshire	.....
	"	Vermont	546.50
E. Rhodenizer	First half		
	1931	New Hampshire	431.50
	"	Vermont	.....
	Last half		
	1931	New Hampshire	164.00
	"	Vermont	413.50
Guy A. Rich	First half		
	1931	New Hampshire	2,694.08
	"	Vermont	1,846.65
	Last half		
	1931	New Hampshire	721.05
	"	Vermont	1,968.60

[fol. 40] IN UNITED STATES DISTRICT COURT

SUPPLEMENTARY AFFIDAVIT OF FRANK J. HAESSLER

I, Frank J. Haessler, of New Haven, Connecticut, on oath depose and say, in addition to my affidavit of June 29, 1932, that I am a full time employee of the Air-Way Electric Appliance Corporation of Toledo, Ohio, and am a special factory representative of the said corporation. I have been employed by the said Air-Way Corporation alone since 1927, and since that time have devoted my full time to the Air-Way Corporation business as special factory representative of the company. I am not a certified public accountant. The figures that appear on my affidavit are taken exclusively from commission vouchers, form 47, which are part of the set of standard forms sold by the said Air-Way Company to its distributors throughout the country, and used by them in their returns to the said Air-Way Company.

The net loss on all business excluding non-canvassing sales for the first half of 1931 is $627.66. I do not know what part of this loss of $627.66 is attributable to the City of Manchester. It is possible to determine this, except possibly for advertising expenses, but it would be a very complicated task and would involve weeks and possibly months for one man to determine what part of this loss of $627.66 is fairly attributable to the City of Manchester. The same is true of the total loss on all business amounting to $4,702.60 for the latter half of 1931.

Mr. Ratta's territory in 1931 and 1932 has comprised, since January 1, 1931, the entire states of New Hampshire and Vermont, and the Western portion of Massachusetts.

I have not determined the amount of expenses properly chargeable to Manchester because, as noted above, this would be a very complicated task. No expense items shown on my former affidavit are allocated to any particular part of the territory, the affidavit showing simply gross expense for the whole territory. I do not know the amount Ratta has lost in Manchester and my affidavit does not show this because of the tremendous amount of work involved in ascertaining this figure, as noted above.

At present, in Western Massachusetts, there are two full time men and about six part time men working as dealers under Mr. Ratta for that territory. In Massachusetts in

1930, there was an average of thirty-nine agents who made sales and received commissions for such sales. In the first half of 1931, there was an average of twenty-nine agents and in the second half of 1931, there was an average of twelve agents working in the Western part of Massachusetts.

[fol. 41] I said in my former affidavit that items of telephone and traveling expense, in any substantial amount, cannot be attributed to the Massachusetts business. I do not know the exact amount of such items fairly attributable to the Massachusetts business. My statement is based on the fact that there were a small number of agents in Massachusetts in 1931 and that Mr. Ratta's home office is in that territory. I do not know the number of telephone calls or their cost fairly attributable to Western Massachusetts. I do not know what proportion of expenses are actually attributable to the Western Massachusetts District.

It is impossible, from the records, to show the actual expenses, net profits, and net losses attributable to the City of Manchester, in 1930, 1931, and the first part of 1932, except upon an analysis of vouchers and correspondence that would take one man's time for weeks and possibly months.

The figures for the first half of 1931 are from January 1 to June 30, inclusive; and for the second half of 1931, the balance of the year.

The records show a drop in the gross sales of the Western Massachusetts business of approximately 75% in the second half of 1931 from the first half.

The records show that the City of Manchester gross sales increased very slightly in the second half of 1931 over the first half.

The records show that the Vermont gross sales dropped approximately 31% in the second half of 1931 from the first half.

The records show that the balance of the New Hampshire gross sales dropped approximately 58% in the second half of 1931 from the first half. The exact figures are shown on Schedule I attached to my former affidavit.

I have been asked by Mr. Lorimer to state my judgment based upon my experience with the Air-Way Electric Appliance Corporation: if there was a decline in the Air-Way

Corporation business in the year 1931 below that of the preceding year; and whether the decline is more pronounced in manufacturing cities than in the country. My answer is "Yes" to both questions, but I base this conclusion on my general knowledge that business in general declined in 1931 below 1930, and my experience with the Air-Way Company does not give me access to any records either of the company or of the distributors, with reference to gross sales, commissions earned by distributors, or profits or losses earned or incurred. My work involves an examination of the dis- [fol. 42] tributors' records to ascertain whether they have on hand the assets, including inventory and bills receivable reported by them, and whether they have correctly reported and accounted for collections made, and whether collections are being properly made, and except for my examination of Ratta's records in connection with the preparation of this case, I have never had occasion to know the profits or losses made by any distributor, or to examine any records having to do with gross sales made by or commissions earned by any distributors, or the expense of doing business.

Frank J. Haessler.

Concord, July 7, 1932.

STATE OF NEW HAMPSHIRE
Merrimack, ss.

Personally appeared Frank J. Haessler and made oath that the above affidavit by him subscribed is true. Before me,
Jonathan Piper, Notary Public. (Seal.)

[fol. 43] IN UNITED STATES DISTRICT COURT

DEFENDANT'S ASSIGNMENT OF ERRORS—Filed February 27, 1933

Now comes the appellant, Michael J. Healy, by Thornton Lorimer, Assistant Attorney-General, his attorney, and in connection with this petition for appeal says that in the record, proceedings and in the final decree aforesaid manifest error has intervened to the prejudice of the appellant, to wit:

1. The court erred in refusing to grant respondent's motion to dismiss the suit for want of jurisdiction.

2. The court erred in refusing to grant respondent's motion to dismiss the bill in equity because the complainant has a plain, adequate and complete remedy at law.

3. The court erred in refusing to grant respondent's motion to dismiss the bill in equity because the value of the subject matter in controversy does not exceed the sum of three thousand dollars.

4. The court erred in refusing to grant respondent's motion to dismiss the bill in equity because of a want of jurisdiction in equity.

5. The court erred in establishing a special district court of three judges, composed of Bingham, C. J. and Letts and Morris, D. J. J.

6. The specially constituted district court erred in deciding the merits of the controversy.

7. The specially constituted district court erred in assuming jurisdiction of the controversy under section 266, Judicial Code as amended (U. S. Code, title 28, section 380).

8. The specially constituted district court erred in finding that respondent was a state officer within the meaning of section 266, Judicial Code as amended (U. S. Code, title 28, section 380).

9. The specially constituted district court erred in entering the decree of injunction against respondent under section 266, Judicial Code as amended (U. S. Code, title 28, section 380).

10. The specially constituted district court erred in entering the decree of injunction against respondent under section 264, Judicial Code (U. S. Code, title 28, section 378).

11. The specially constituted district court erred in holding that the statute of the state of New Hampshire enacted April 14, 1931 entitled "An Act Relating to Hawkers and Peddlers" is in entirety in contravention of the Constitution of the United States, especially of article 4, section 2 and of the fourteenth amendment to said Constitution and therefore is in entirety unconstitutional and void.

[fols. 44–48] 12. The specially constituted district court erred in holding that section 3 of said act is in contraven-

tion of the Constitution of the United States, especially of section 1 of the fourteenth amendment to said Constitution.

13. The specially constituted district court erred in holding that section 11 of said act is in contravention of the Constitution of the United States, especially of article 4, section 2 and of section 1 of the fourteenth amendment to said Constitution.

Wherefore appellant prays that the decree of the specially constituted district court of the United States for the District of New Hampshire may be vacated and the cause remanded to the District Court of the United States for the District of New Hampshire.

Thornton Lorimer, Assistant Attorney-General, Attorney for Appellant.

[fol. 49] In United States Circuit Court of Appeals for the First Circuit, October Term, 1933

No. 2823

Michael J. Healy, Chief of Police of Manchester, New Hampshire, Defendant, Appellant,

v.

Louis D. Ratta, Plaintiff, Appellee

Appeal from the District Court of the United States for the District of New Hampshire

Before Wilson, Morton and Anderson, JJ.

Opinion—Filed November 10, 1933.

Wilson, J.

This is an appeal from a decree entered in the District Court of New Hampshire permanently enjoining the appellant as chief of police of the city of Manchester, New Hampshire, from enforcing the provisions of Chap. 102 of the Public Laws of New Hampshire approved April 14, 1931, entitled "An Act Relating to Hawkers and Peddlers."

The appellee is a resident of Springfield, Massachusetts. His business is that of a distributor of vacuum cleaners

under a contract with a concern known as the Air-Way Sanitary System. His territory consists of New Hampshire, Vermont and the western part of Massachusetts. In conducting his business in New Hampshire prior to the enactment of Chap. 102 of the Public Laws of 1931, he em-[fol. 50] ployed agents who traveled from house to house, and in case of sale delivered the article at the time of sale.

The chief of Police of Manchester, following the passage of the Hawkers and Peddlers Act of 1931, notified the appellee that under such a method of transacting his business it was necessary for the agents of the appellee to take out a license, and upon failure to do so an agent would be liable to arrest and a fine of $200.

In November, 1931, the appellee filed his bill in equity seeking to restrain the appellant, as chief of police, from enforcing the provisions of the statute on the ground that it violated the provisions of Sec. 2 of Article IV and Sec. 1 of Amendment XIV of the Federal Constitution.

The provisions of the Act alleged to render the Act void as in violation of the provisions of the Federal Constitution are as follows:

"2. Prohibition; Penalty. No hawker or peddler shall sell or barter or carry for sale or barter, or expose therefor, any goods, wares or merchandise, unless he holds a license so to do as herein provided. Any person violating this section shall be fined not more than two hundred dollars, to be equally divided between the state and the town in which the offense was committed. Such sums as may be paid into the state treasury as penalties shall be credited to the secretary of state for his use in the enforcement of this chapter.

"3. Exceptions. The provisions of this chapter relating to hawkers and peddlers shall not apply to wholesalers or jobbers selling to dealers only, nor to commercial agents or other persons selling by sample, lists, or catalogues, nor to any person selling provisions, agricultural implements, fruit trees, vines, shrubs, books, newspapers, pamphlets, the products of his own labor or the labor of his family and the product of his own farm or the one which he tills, the manufacturers of furniture and ladders excepted.

"11. Persons Exempt. Any soldier or sailor disabled in any war in which the United States has been engaged, or

by sickness or disability contracted therein or since his discharge from the service because of such service, and the [fol. 51] widow of any such soldier or sailor so long as she remains unmarried, or any citizen of this state over seventy years of age, shall be exempt from paying the license fees required by this chapter."

Since the bill originally contained a prayer for a temporary injunction, it presented a case for invoking a statutory court, so-called, under Sec. 266 of the Judicial Code. Before the hearing, however, the prayer for a temporary injunction was waived; but the case was finally heard by the district judge of New Hampshire, together with a judge of the Circuit Court of Appeals and an additional district judge, as though it were a proper case for hearing by a statutory court.

On an appeal to the Supreme Court under Section 266 of the Judicial Code, it was pointed out that the Supreme Court had no jurisdiction since the prayer for a temporary injunction was waived. Healy v. Ratta, 289 U. S. 701.

Prior to the decision of the Supreme Court, however, the appellant filed a petition for appeal to this court, which had been allowed, presumably by the district judge of New Hampshire.

The opinion of the court, though drawn by the additional district judge, was joined in by the district judge of New Hampshire, and the judgment of the District Court was signed by all three judges hearing the case.

In the defendant's assignment of errors on appeal to this court he assigned as error the establishment of a statutory court under Section 266 of the Judicial Code, and that it erred in entering a decree of permanent injunction against the defendant. In his brief and argument before this court, however, he did not press the assignment of error that a statutory court had no jurisdiction in the premises, and relied only on the following assignment of errors:

"1. The court erred in refusing to grant respondent's motion to dismiss the bill in equity because the complainant has a plain, adequate and complete remedy at law.

2. The court erred in refusing to grant respondent's motion to dismiss the bill in equity because the value of the

subject matter in controversy does not exceed the sum of three thousand dollars.

[fol. 52] 3. The court erred in refusing to grant respondent's motion to dismiss the bill in equity because of a want of jurisdiction in equity.

4. The court erred in holding that the statute of the state of New Hampshire enacted April 14, 1931, entitled 'An Act Relating to Hawkers and Peddlers' is in entirety in contravention of the Constitution of the United States, especially of article 4, section 2 and of the fourteenth amendment to said Constitution and therefore is in entirety unconstitutional and void.

5. The court erred in holding that section 3 of said act is in contravention of the Constitution of the United States, especially of section 1 of the fourteenth amendment to said Constitution.

6. The court erred in holding that section 11 of said act is in contravention of the Constitution of the United States, especially of article 4, section 2 and of section 1 of the fourteenth amendment to said Constitution.

7. The court erred in entering the decree of injunction against respondent.

It has been held in such instances that the joining of the two additional judges in a decree does not render the judgment void. Cannonball Transportation Co. v. American Stages, Inc. et al., 53 Fed. (2d) 1050. By waiving his assignment of errors relating to the lack of jurisdiction in the statutory court, we think the appellant must be held to have accepted the judgment as though rendered by the District Judge of New Hampshire and as unaffected by the unnecessary joinder of the two additional judges.

The assignment of errors relied upon may be grouped under three heads: (1) the necessary jurisdictional amount was not involved; (2) the case presents no ground for equitable relief; and (3) that the New Hampshire statute did not violate Sec. 2 of Article IV, or Sec. 1 of the fourteenth amendment to the Federal Constitution.

The necessary jurisdictional amount is alleged and we think it sufficiently appears that it is involved. It is not necessary that it appear that the appellee is required to pay the jurisdictional amount annually in license fees; nor do

we think it necessary in this case to capitalize the annual license fees in order to fulfill the jurisdictional requirement. The appellee claims the right to conduct his business free from wrongful interference by the appellant, and seeks the [fol. 53] protection of that right now and in the future. It is the value of the object to be gained that is the test of the amount involved. Glenwood Light & Water Co. v. Mutual Light, Heaf & Power Co., 239 U. S. 121, 126; First National Bank of Columbus, Ohio v. Louisiana Highway Commission et al., 264 U. S. 308, 310; Hunt v. New York Cotton Exchange, 205 U. S. 322, 336.

The evidence disclosed that prior to 1931 the gross sales of the appellee in New Hampshire were nearly $90,000, which were larger than in all the rest of the territory assigned to him, and that his net profits in 1930 in the entire territory were over $11,000. Following the enactment of the New Hampshire Hawkers and Peddlers law, his profits fell off, and his business throughout the entire territory showed a loss. While it is not possible to determine from the record to what extent the falling off was due to the different method required in transacting his business in order to conform to the Act of 1931, the appellee testified that to comply with the law would entail much additional expense and would result in conducting his business at a loss.

It is not necessary, however, for him to wait until the value of his right reaches the jurisdictional amount, if it has not already done so. Scott v. Donald, 165 U. S. 107, 115; Hunt v. New York Cotton Exchange, supra, at page 336.

While it is a general rule that equity will not enjoin the enforcement of criminal laws, it will do so when property rights are involved and are jeopardized by the enforcement of an unconstitutional law, unless the complainant has a clear, adequate remedy at law.

By reason of the effect a compliance with the statute has had upon his business, we think he has no adequate remedy at law and is entitled to equitable relief. It is urged that his agents could pay the license fees under protest and in an action at law recover them back if the statute is void; but it appears from the undisputed evidence that he cannot find agents or salesmen, many of those applying being inexperienced in this kind of business, who will undertake such employment if obliged to pay an annual fee of $50;

and as a result the appellee would be obliged to pay the [fol. 54] fees for all his salesmen in New Hampshire. With the changes in salesmen, owing to the nature of the business, due to unfitness or inexperience, an enforcement of this law would inevitably result in conducting such business at a loss, as it has already done. If he recovered the license fees paid, it would not adequately compensate him for the losses sustained in the meantime in complying with the law.

It is also urged that the appellee could invoke the Declaratory law of New Hampshire and obtain a judgment as to the validity of the law. Faulkner v. City of Keene, 85 N. H. 147. Whether such an action would be full and complete, or can be termed an adequate remedy at law which will bar a proceeding in equity, is doubtful. At least no such remedy was available to the complainant in the Federal Courts. Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 74; and Sec. 267 of the Judicial Code has reference to the adequacy of the remedy on the law side in the Federal Courts; Smyth v. Ames, 169 U. S. 466, 516; Chicago B. & Q. Railroad Co. v. Osborne, 265 U. S. 14, 16; Risty v. Chicago, R. I. & Pac. Ry. Co., 270 U. S. 378, 388; Henrietta Mills v. Rutherford County, 281 U. S. 121, 126.

It is virtually conceded by counsel for the appellant that Sec. 11 exempting citizens of New Hampshire over 70 years of age from paying any license fees violates Sec. 1 of Amendment XIV of the Federal Constitution. If this were the only unconstitutional provision it might not affect the entire act. Sec. 3 of the Act, however, contains so many discriminatory provisions and unreasonable classifications that clearly deny the complainant equal protection under the law and deprive him of equal privileges with venders of other articles of merchandise, and so vitally affect the entire act that we think the act as a whole must fall. Terrace et al. v. Thompson, 263 U. S. 197, 214, 215; Packard v. Banton, 264 U. S. 140; Truax v. Raich, 239 U. S. 33; Real Silk Mills v. Portland, 268 U. S. 325.

The act cannot be sustained as imposing an excise tax as the New Hampshire constitution does not authorize this form of taxation. State v. U. S. & Canada Express Co., 60 [fols. 55 & 56] N. H. 219. It can only be sustained as an

exercise of the police powers to safeguard the public health, safety, morals, or to promote the general welfare.

A statute that permits one to sell household articles from house to house by sample, but not to deliver at time of sale without a license; to sell and deliver at the time of sale fruit trees, vines and shrubs without a license, but not evergreen trees, shade tres, strawberry plants, or rhubarb or asparagus roots; which permits a farmer to peddle without a license the fruit he raises, while one who does not raise them may not; which permits a manufacturer to sell without a license some articles of household use, but not furniture; which permits the sale of provisions, but not of shoes, brushes, combs, needles or thread, unless the product of the salesman's own labor; which permits the sale of books, newspapers and pamphlets, but not of magazines; which permits without a license the sale from house to house of hoes, shovels, scythes or rakes for the farmer, but not a vacuum cleaner for the housewife, cannot be sustained as promoting the health, safety, morals or welfare of the public, and clearly deprives the complainant of his constitutional rights and privileges secured to him under Art. IV and the fourteenth amendment of the Federal Constitution. Truax v. Raich, supra, at page 41; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 551; Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U. S. 150, 155; Home Tel. & Tel. Co. v. City of Los Angeles, 227 U. S. 278; Bliss's Petition, 63 N. H. 135; State v. Lancaster, 63 N. H. 267.

The decree of the District Court is affirmed with costs.

[fols. 57–60] In United States Circuit Court of Appeals, First Circuit

Final Decree—November 10, 1933

This cause came on to be heard October 4, 1933, upon the transcript of record of the District Court of the United States for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now, to wit, November 10, 1933, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed with costs.

By the Court.

Arthur I. Charron, Clerk.

[fols. 61 & 62] IN UNITED STATES COURT OF APPEALS

ASSIGNMENT OF ERRORS—Filed December 1, 1933

Comes now the said Michael J. Healy, Chief of Police of Manchester, New Hampshire, appellant in the above entitled cause and files the following assignment of errors upon which he will rely in the prosecution of the appeal [fols. 63 & 64] herewith petitioned for in said cause from the decree of this court entered on the tenth day of November, 1933.

1. The court erred in holding that the statute of the state of New Hampshire enacted April 14, 1931 entitled "An Act Relating to Hawkers and Peddlers" is in entirety in contravention of the Constitution of the United States, especially of article IV, section 2 and of the fourteenth amendment to said Constitution and therefore is in entirety unconstitutional and void.

2. The court erred in holding that section 3 of said act is in contravention of the Constitution of the United States, especially of article IV and section 1 of the fourteenth amendment to said Constitution.

3. The court erred in holding that section 11 of said act is in contravention of the Constitution of the United States, especially of article IV, section 2 and of section 1 of the fourteenth amendment to said Constitution.

4. Because of the aforementioned errors the court erred in refusing to grant the motion filed by the defendant to dismiss the bill in equity.

[fols. 65-92] Wherefore appellant prays that the said decree may be reversed and for such other and further relief as to the court may seem just and proper.

(Sgd.) Thornton Lorimer, Attorney for Appellant.

November 29, 1933.

November 29, 1933.

STATE OF NEW HAMPSHIRE,
Merrimack, ss:

I hereby certify that I have forwarded to Demond, Woodworth, Sulloway & Rogers, attorneys for appellee in this action, a copy of this assignment of errors.

Subscribed and sworn to before me. (Sgd.) Marion G. Alexander, Justice of the Peace.

[fols. 93-101] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER ALLOWING APPEAL—December 16, 1933

The appellant in the above entitled case having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the final decree made and entered in this case by the United States Circuit Court of Appeals for the First Circuit on the tenth day of November, 1933, and from each and every part thereof, and having presented and filed his petition for appeal, assignment of errors, prayer for reversal, and a stipulation waiving bond on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same hereby is, allowed to the Supreme Court of the United States from the United States Circuit Court of Appeals for the First Circuit in this cause, as provided by law, and it is further ordered that the clerk of the court appealed from shall prepare and certify a transcript of the record, proceedings, and final decree in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within thirty days of this date.

By the Court.

Arthur I. Charron, Clerk.

[fol. 102] UNITED STATES SUPREME COURT

DEFINITE STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY AND OF THE PARTS OF THE RECORD WHICH HE THINKS NECESSARY FOR THE CONSIDERATION THEREOF—Filed Jan. 19, 1934

A. The appellant intends to rely on the following points:

1. That the Supreme Court of the United States has jurisdiction upon this appeal to review the final decree of the United States Circuit Court of Appeals for the First Circuit in the case of Michael J. Healy, Chief of Police of Manchester, New Hampshire v. Louis D. Ratta, No. 2823.

2. The court erred in holding that the statute of the state of New Hampshire enacted April 14, 1931 entitled "An

Act Relating to Hawkers and Peddlers" is in entirety in contravention of the Constitution of the United States, especially of article IV, section 2 and of the fourteenth amendment to said Constitution and therefore is in entirety unconstitutional and void.

3. The court erred in holding that section 3 of said act is in contravention of the Constitution of the United States, especially of article IV and section 1 of the fourteenth amendment to said Constitution.

4. The court erred in holding that section 11 of said act is in contravention of the Constitution of the United States, especially of article IV, section 2 and of section 1 of the fourteenth amendment to said Constitution.

5. Because of the aforementioned errors the court erred in refusing to grant the motion filed by the defendant to dismiss the bill in equity.

B. The parts of the record which appellant thinks necessary for consideration of the above points are as follows:

1. The bill of complaint and amendments thereto.

2. Defendant's motion to dismiss and answer.

3. Opinion of the District Court by Letts, J.

4. Decree of the District Court.

5. Assignment of errors relied upon in appeal from District Court to Circuit Court of Appeals as set forth in opinion of Wilson, J.

[fol. 102a] 6. Opinion of the Circuit Court of Appeals by Wilson, J.

7. Order allowing the appeal from the Circuit Court of Appeals to the Supreme Court of the United States.

8. Assignment of errors in the appeal from the Circuit Court of Appeals for the First Circuit to the Supreme Court of the United States.

9. The statement particularly disclosing the basis upon which appellant contends that the Supreme Court of the United States has jurisdiction upon appeal to review the final decree of the Circuit Court of Appeals in the case of Michael J. Healy, Chief of Police of Manchester, New

Hampshire, v. Louis D. Ratta, In Equity No. 2823, consisting of the statutory provision sustaining said jurisdiction; the statute of the state of New Hampshire, the validity of which is involved; the date of the decree sought to be reviewed; the nature of the case and rulings of the court and the cases sustaining jurisdiction of the United States Supreme Court.

Thornton Lorimer, Attorney for Appellant.

January 11, 1934.

January 11, 1934.

STATE OF NEW HAMPSHIRE,
Merrimack, ss:

Service is hereby acknowledged and accepted by Demond, Woodworth, Sulloway and Rogers, attorneys for Louis D. Ratta, appellee in this case, of "definite statement of the points on which appellant intends to rely and of the parts of the record which he thinks necessary for the consideration thereof."

Louis D. Ratta, Appellee, by Demond, Woodworth, Sulloway and Rogers, by Jonathan Piper.

[fol. 102b] [File endorsement omitted.]

[fol. 103] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION, ETC.—February 5, 1934

In this case probable jurisdiction is noted. The attention of counsel is directed to the question, among the other questions presented by the appeal, whether the amount in controversy is such as to sustain the jurisdiction of the District Court.

[fols. 104 & 105] SUPREME COURT OF THE UNITED STATES

STIPULATION TO PRINT ADDITIONAL PORTIONS OF RECORD—Filed Feb. 12, 1934

It is hereby stipulated by and between the parties in the above-entitled case that in addition to the parts of the rec-

ord heretofore designated by the appellant as necessary for consideration of the case, there shall be printed items 7 and 8 of the "Stipulation of the Record to be Included in the Transcript," namely:

"7. Testimony at hearing on June 14, 1932.

"8. Affidavit of Louis D. Ratta. Affidavit of Frank J. Haessler. Supplementary affidavit of Frank J. Haessler."

Thornton Lorimer, Assistant Attorney-General, Attorney for Michael J. Healy. Jonathan Piper, Attorney for Louis D. Ratta.

[fol. 106] [File endorsement omitted.]

Endorsed on cover: File No. 38,334. U. S. Circuit Court of Appeals, First Circuit. Term No. 731. Michael J. Healy, Chief of Police of Manchester, N. H., Appellant, vs. Louis D. Ratta. Filed January 19, 1934. File No. 731, O. T., 1933.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 731

MICHAEL J. HEALY, CHIEF OF POLICE OF MANCHESTER, N. H., APPELLANT,

vs.

LOUIS D. RATTA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

STATEMENT AS TO JURISDICTION.

A. The statutory provision sustaining said jurisdiction is United States Code, Title 28, paragraph 347, section (*b*) (Judicial Code, section 240 as amended by Act of February 13, 1925).

> "(*b*) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not

be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case."

B. The statute of the State of New Hampshire, the validity of which is involved, is Laws of the State of New Hampshire, 1931 Session, chapter 102, entitled "An Act Relating to Hawkers and Peddlers."

"Chapter 102.

An Act Relating to Hawkers and Peddlers.

Section 1. Definitions; penalty; applications; certificates; licenses; fees; term of licenses; record, persons exempt; badges; revocation of licenses; counterfeiting; assistance.

Section 2. Takes effect.

Be it enacted by the Senate and House of Representatives in General Court convened:

1. Amendment.—Chapter 157 of the Public Laws is hereby amended by striking out the whole thereof and substituting therefor the following:

1. Definition.—Except as hereinafter expressly provided, the terms "hawker" and "peddler" as used in this chapter shall mean and include any person, either principal or agent, who goes from town to town or from place to place in the same town selling or bartering, or carrying for sale or barter or exposing therefor, any goods, wares or merchandise.

2. Prohibition; Penalty: No hawker or peddler shall sell or barter or carry for sale or barter, or expose therefor, any goods, wares or merchandise, unless he holds a license so to do as herein provided. Any person violating this section shall be fined not more than two hundred dollars,

to be equally divided between the state and the town in which the offense was committed. Such sums as may be paid into the state treasury as penalties shall be credited to the secretary of state for his use in the enforcement of this chapter.

3. Exceptions.—The provisions of this chapter relating to hawkers and peddlers shall not apply to wholesalers or jobbers selling to dealers only, nor to commercial agents or other persons selling by sample, lists, or catalogues, nor to any person selling provisions, agricultural implements, fruit trees, vines, shrubs, books, newspapers, pamphlets, the products of his own labor or the labor of his family and the product of his own farm or the one which he tills, the manufacturers of furniture and ladders excepted.

4. Applications.—The secretary of state shall grant such license to any person who files in his office a certificate, signed by the mayor of a city or a majority of the selectmen of a town, stating that, to their best knowledge and belief, the applicant therein named is of good moral character; and is, or has declared his intention to become, a citizen of the United States. Such license shall not be granted to any other person.

5. Certificates.—The mayor or selectmen, before granting such certificate, shall require the applicant to make oath that he is the person named therein, and that he is, or has declared his intention to become, a citizen of the United States. They shall forthwith act upon such application when made, and shall at once issue a certificate to the applicant if found qualified.

6. Local Licenses.—The secretary of state shall cause to be inserted in every license a synopsis of this chapter and the names of such cities and towns as the applicant

selects, with the sums to be paid to the respective treasurers thereof, as provided in section 7, and shall receive from the applicant one dollar for each city and town so inserted.

7. Fees.—Every person licensed under the preceding sections shall pay to the treasurer of each city or town mentioned in his license the following sums before offering or exposing for sale any goods, wares or merchandise therein: For every town of not more than one thousand inhabitants, according to the census next preceding the date of his license, five dollars; for a town of more than one thousand and less than two thousand inhabitants, eight dollars; for a town of more than two thousand and not more than three thousand inhabitants, ten dollars; and for every thousand inhabitants in excess of three thousand, one dollar. The treasurer shall certify on the face of such license the sum so paid, which shall be for the use of such city or town.

8. State Licenses.—The secretary of state, upon conditions required in section 4, shall grant special state licenses upon the payment by the applicant of fifty dollars for the use of the state as a state license fee, and the person so licensed may do business as a hawker or peddler in any city or town in this state, without further payments.

9. Term; Transfer.—All licenses issued under the provisions of this chapter shall bear date of the day they are issued and shall continue in force one year. A license granted under section 8 may be transferred by the secretary of state, upon application therefor, accompanied by a fee of one dollar and upon evidence furnished by the applicant like that required for the original granting of such license, and the transferee of a license granted under said section 8 may go about carrying for sale or barter,

exposing therefor and selling or bartering any articles described therein within the state. The secretary of state may make rules and regulations consistent with law covering the transfer of licenses granted under said section 8.

10. Record.—The secretary of state and the treasurers of cities and towns shall keep records of all such licenses upon which the sums herein provided have been paid to them, with the number of each, the names and residences of the persons licensed and the sums received thereon, and all such records shall be open for public inspection.

11. Persons Exempt.—Any soldier or sailor disabled in any war in which the United States has been engaged, or by sickness or disability contracted therein or since his discharge from the service because of such service, and the widow of any such soldier or sailor so long as she remains unmarried, or any citizen of this state over seventy years of age, shall be exempt from paying the license fees required by this chapter.

12. Endorsing License; Exhibiting License; Use of Badges.—Every person licensed as a hawker or peddler shall endorse his usual signature upon his license. When his license is demanded of him by a mayor, selectman, alderman, town or city treasurer, sheriff or his deputy, any constable or police officer or any person to whom he sells or offers or exposes for sale his wares, he shall forthwith exhibit the same, and if he neglect or refuse so to do he shall be liable to the same penalty as if he had no license. The secretary of state shall, at the expense of the licensee, provide a badge for each peddler, and such badges shall bear the number of the license, the word 'peddler,' and such other information as the secretary of state may deem necessary. Each peddler shall wear his badge in a conspicuous place.

13. License Effective Where.—No license shall be effective in any place other than the place or places wherein it authorizes the licensee to operate.

14. Revocation of Licenses.—Any license granted by the secretary of state to a hawker or peddler may be revoked by him (1) upon conviction of the licensee of any offense which in the judgment of the secretary warrants such revocation, or (2) upon the submission to the secretary of evidence satisfactory to him that, during the term of the license, and acting under cover thereof, the licensee has accepted or solicited money otherwise than through a *bona fide* sale or barter of goods, wares or merchandise, or has in any manner begged or solicited alms from the public, or (3) for any other sufficient cause. Whenever any person is convicted of a violation of any provision of this chapter, relative to hawkers and peddlers, the clerk of the court in which, or the trial justice by whom, such person was convicted shall notify the secretary of state.

15. Counterfeiting Licenses, etc.—Whoever counterfeits or forges a license, or has a counterfeited or forged license in his possession with the intent to utter or use the same as true, knowing it to be false or counterfeit, or attempts to sell under a license which has expired or has been revoked or cancelled, or which has not been issued or transferred to him or has in his possession another's license with intent to use the same, shall be punished by a fine of not more than one thousand dollars.

16. Assistance.—The secretary of state and the state treasurer are authorized to employ such assistance and to incur such expense for the administration of this act as the governor and council may approve, and the governor is authorized to draw his warrant therefor.

2. Takes Effect.—This act shall take effect upon its passage.

(Approved April 14, 1931.)"

C. The date of the decree sought to be reviewed was November 10, 1933. The date upon which the application for appeal was presented was November 29, 1933. The date of the decree of the District Court of the United States for the District of New Hampshire was November 29, 1932.

Nature of the Case and Rulings of the Court.

This is a bill in equity in which the plaintiff sought to enjoin the chief of police of Manchester, New Hampshire from interfering with canvassers employed in selling vacuum cleaners from house to house in said Manchester. The defendant, acting under authority of chapter 102, Laws of 1931, known as the hawkers and peddlers act, threatened to arrest and prosecute the plaintiff's dealers in Manchester unless they obtained licenses in accordance with the provisions of said statute.

In part plaintiff alleged that said statute contravened the provisions of the Bill of Rights of the Constitution of the State of New Hampshire and article IV, section 2 of, and article 14 of the amendments to, the Constitution of the United States in that by reason of the alleged arbitrary and discriminatory character of sections 3 and 11 of said statute, providing for certain exceptions and exemptions, he was denied the equal protection of the laws, the rights, privileges and immunities granted to the citizens of the State of New Hampshire and his property was taken without due process of law. The defendant denied these allegations and contended that said statute in no manner contravened the Bill of Rights of the State of New Hampshire and the Constitution of the United States. The defendant further answered that if section 3 and/or section

11 of said statute was unconstitutional nevertheless either or both of said sections were separable and severable from the balance of the act and were not essential parts of said act and that even if either or both of said sections or any part thereof were unconstitutional it therefore would not invalidate the remainder of said act but would merely render nugatory that portion of the act which was unconstitutional.

The Circuit Court of Appeals, in an opinion by Wilson, J., ruled that the provision in section 11 exempting citizens of New Hampshire over seventy years of age from paying any license fees violates section 1 of article 14 of the amendments to the Constitution of the United States and further ruled that the classifications attempted under the provisions of section 3 of the statute "deprives the complainant of his constitutional rights and privileges secured to him under article IV and the fourteenth amendment of the Federal Constitution" and "so vitally affect the entire act that * * * * the act as a whole must fall." The decree of the Circuit Court of Appeals affirmed the decree of the District Court, which ruled that other classifications attempted under the provisions of section 11 of the statute were unreasonable and arbitrary and deprived plaintiff of his property without due process of law and therefore contravened section 1 of the fourteenth amendment to the Constitution of the United States.

The case sustaining jurisdiction is:

Public Service Commission of Indiana et al. v. *Batesville Telephone Co.*, 284 U. S. 6 (1931).

MICHAEL J. HEALY,
Chief of Police of Manchester, New Hampshire,
(Sgd.) By THORNTON LORIMER,
Attorney for Defendant.

(4474C)

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CONCISE STATEMENT OF THE CASE

The plaintiff in the court below brought a bill in equity to restrain the defendant, the chief of police of Manchester, New Hampshire, from enforcing the hawkers and peddlers act (chapter 102, Laws of 1931 of the State of New Hampshire) against the plaintiff's canvassers. Originally the plaintiff prayed for temporary relief and a preliminary injunction but later waived these prayers.

In part the plaintiff alleged that the statute contravened article 4, section 2 of, and article 14 of the amendments to the Constitution of the United States in that, by reason of the alleged arbitrary and discriminatory character of sections 3 and 11 of said statute providing for certain exceptions and exemptions, he was denied the equal protection of the laws, the rights, privileges and immunities granted to the citizens of the state of New Hampshire and his property was taken without due process of law. He alleged that his business would suffer irreparable damage by reason of the enforcement of this law against him and his canvassers.

The defendant moved to dismiss the bill because the value of the subject matter did not exceed the sum of three thousand dollars, because the plaintiff had a plain, adequate and complete remedy at law and because of want of jurisdiction in equity and in further answer denied that the act was in whole or in part unconstitutional. The defendant further contended that if the act was in part unconstitutional nevertheless such part as was held unconstitutional was severable from the balance of the act which should remain in force.

The district court of its own motion established a specially constituted court of three judges to hear the issue whether a permanent injunction should be granted. The court ruled that the entire act was unconstitutional and that section 11 of the act violated article 4, section 2 of the Constitution of the United States and that sections 3 and 11 of the act violated section 1 of the fourteenth amendment to the Constitution of the United States.

On November 29, 1932 the court entered the decree enjoining the defendant and his officers from enforcing the act against the plaintiff and his dealers in connection with their selling of Air-Way Vacuum Cleaners and parts. The defendant appealed to this court.

This court dismissed the appeal on jurisdictional grounds on March 20, 1933. The defendant appealed to the circuit court of appeals and that court affirmed the decree of the district court. The defendant now appeals to this court and assigns as errors the rulings of the courts below that sections 3 and 11 of the act were unconstitutional and that the act was unconstitutional in whole and filed his definite statement of the points on which he intends to rely (page 52, transcript of record) and intends to urge these same points before this court.

This court further requested argument of the jurisdictional question whether the amount in controversy is such as to sustain the jurisdiction of the district court. The appellant denies that the district court had jurisdiction and respectfully submits that the decree of the circuit court of appeals should be reversed and that the decree of the district court should be vacated, with judgment for the appellant with costs.

TABLE OF CITED CASES.

A

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Public Laws 1926, chapter 60, sections 1, 2, 4, 26 15, 16
Public Laws 1926, chapter 106, sections 19, 20 15
Public Laws 1926, chapter 202, section 5 15
Laws of 1931, chapter 165 16

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

1. The court erred in holding that the statute of the state of New Hampshire enacted April 14, 1931 entitled "An Act Relating to Hawkers and Peddlers" is in entirety in contravention of the Constitution of the United States, especially of article IV, section 2 and of the fourteenth amendment to said Constitution and therefore is in entirety unconstitutional and void.

2. The court erred in holding that section 3 of said act is in contravention of the Constitution of the United States, especially of article IV and section 1 of the fourteenth amendment to said Constitution.

3. The court erred in holding that section 11 of said act is in contravention of the Constitution of the United States, especially of article IV, section 2 and of section 1 of the fourteenth amendment to said Constitution.

4. At the direction of this court the appellant contends and will argue that the district court did not have jurisdiction over the controversy because the value of the subject matter did not exceed the sum of three thousand dollars.

5. Because of the aforementioned errors the court erred in refusing to grant the motion filed by the defendant to dismiss the bill in equity.

ARGUMENT

A.

THE VALUE OF THE SUBJECT MATTER IN CONTROVERSY DOES NOT EXCEED THE SUM OF THREE THOUSAND DOLLARS.

The district court found that the amount in controversy exceeded three thousand dollars by the application of the principle of capitalizing the annual license fees.

The circuit court of appeals found it unnecessary to apply this principle in order to fulfill the jurisdictional requirement. It stated that the value of the object to be gained is the test of the amount involved and that this object is the right to conduct the business free from wrongful interference by the appellant. The circuit court of appeals then fell into plain error. It found that the jurisdictional requirement was satisfied on the reasoning that the object to be gained was the value of the plaintiff's business in the entire state of New Hampshire.

The object to be gained however is the plaintiff's right to conduct his business in the city of Manchester free from wrongful interference by the appellant. It is the value of this right which must exceed three thousand dollars. This is not a suit against state officials embracing state wide jurisdiction. It is a suit against the officials of the city of Manchester.

The appellant contends that he is not interfering with any property right of the plaintiff whose agents peddle from door to door. "The act of strangers in going upon private property uninvited and ringing door bells is not in our judgment a property right." *Town of Green River* v. *Fuller Brush Co.*, (C. C. A.) 65 Fed. 2d, 112 (1933).

Unless the principle of capitalizing license fees is applicable the evidence clearly shows that the value to be placed on the interference of the Manchester police is vague and conjectural and does not exceed three thousand dollars.

At the hearing in the district court the plaintiff did not produce his records to support his allegations and to serve as a basis for cross examination. Counsel for the respondent therefore agreed that a deposition as to the actual losses might be submitted to the

court at a later period. Ratta's general testimony concerning the loss he attributed to the respondent was to be made more specific by the later introduction of figures showing his actual loss attributable to the respondent. In order to present figures showing the actual loss the plaintiff called upon Frank J. Haessler, accountant for the Air-Way Electric Appliance Corporation. Haessler's figures as submitted in his affidavit and supplementary affidavit contradict and disprove statements made by Ratta at the hearing. It must be kept in mind that Ratta's territory covered western Massachusetts, Vermont and New Hampshire and that the jurisdictional amount can only be satisfied by showing that in the city of Manchester alone the value of the respondent's wrongful interference in the plaintiff's right to conduct his business is over three thousand dollars. Statements quoted hereafter are from the statement of evidence as agreed upon by the parties and printed on page twenty-seven of the transcript of record.

Ratta testified "In May and June 1931 his business suffered a slump, the reason being the enforcement of the hawkers and peddlers law against the agents whereby they had to get a license or sell by sample and deliver at a future date." Haessler's figures for the plaintiff show just the opposite. There was no slump in Manchester. The Manchester business in the last half of 1931 increased over the first half of 1931 although the plaintiff's business in the balance of New Hampshire, in Vermont and in Massachusetts slumped badly. Instead therefore of showing that the respondent wrongfully interfered with the plaintiff's business in Manchester in the amount of three thousand dollars Haessler's figures show beyond doubt that the Manchester business increased.

Ratta further stated that he could not hire experienced salesmen because they did not wish to do business by the method of sale by sample. "All that he could employ as agents were men without experience who had been out of work for a long time, men that were desperate." In Manchester however, in the first half of 1931 when no hawkers and peddlers act was being enforced against Ratta, he had an average of six dealers with an average gross sales per dealer of $312.10. Presumably these dealers were experienced men. In the last half of 1931 in Manchester, when the hawkers and peddlers act was being enforced and when Ratta had to do business by the method of sale by sample, he had the same average of six dealers whose average gross sales per dealer were $321.50.

Apparently therefore the inexperienced and "desperate" dealers selling by sample and averaging $321.50 per dealer in the latter half of 1931 were more profitable to Ratta than the six experienced dealers making delivery at the time of sale in the first half of 1931 whose average gross sales per dealer were only $312.10. In all events in the city of Manchester Ratta did a better business in the latter half than in the first half of 1931 and Manchester is the only part of his territory showing a favorable increase for this period. It is difficult therefore to understand how the respondent wrongfully interfered with the plaintiff's business in Manchester to the amount of three thousand dollars. If the respondent did wrongfully interfere in Manchester it was for the benefit of Ratta.

Ratta further stated "During 1931 and 1932 the Vermont business showed a profit. The Massachusetts business carried along fairly well. The Massachusetts and Vermont business during 1931 and 1932 has held up to the average production before whereas in New Hampshire and in Manchester during this period the business decreased." Haessler submitted no figures allocating the profit for any particular district or territory. He said he was unable to do so. The figures he did submit show an increase in the Manchester business in the latter half of 1931 over the first half of 1931 and a drop in the gross sales of western Massachusetts business of approximately 75% in the same period and a drop in the Vermont gross sales of approximately 31% in the same period. These figures show beyond all doubt that the Massachusetts and Vermont business during 1931 and 1932 did not hold up to the average production before and clearly indicate that Ratta's testimony is unreliable. He further stated "The results of the business in Ratta's entire territory during the first half of 1931 showed losses of thirteen hundred dollars and for the second half of 1931 a loss of forty-seven hundred dollars and during that time Massachusetts and Vermont at least held their own. Ratta knows of nothing else except the enforcement of this act to cause the loss." This statement, taken in connection with Haessler's figures showing a drop of 75% in the Massachusetts gross sales and a drop of 31% in the Vermont gross sales for the second half of 1931, conclusively indicates that Ratta erred. Ratta cannot blow hot and his own accountant blow cold and expect the court to believe both. It comes down to the question of who the court should believe — Ratta or his accountant. The figures speak for themselves.

Ratta further stated that "The situation in Manchester affected his business elsewhere because he trained and hired all his men for New Hampshire at the Manchester office and not having the proper number of men functioning in Manchester it seemed to break down the morale of new men." Haessler's figures show that Ratta averaged six dealers in the first half of 1931 and six dealers in the latter half of 1931. Presumably six dealers were the proper number in the first half of the year and he kept the same number during the latter half, consequently there is no basis for his statement.

Clements, Ratta's manager, testified that "In the city of Manchester alone the volume of sales was probably 25% in the last six months of 1931 compared to the volume done in the first six months of the same year." Haessler's figures show that instead of a loss of 75%, as Clements would have the court believe, there was a slight increase.

In view of the Manchester business holding up in the latter half of 1931 and the business in the other districts of Ratta's territory showing a sharp decrease it would appear that Ratta suffered no loss in Manchester.

The truth of the matter is clear. Ratta's loss was due to unfavorable business conditions. The plaintiff's Manchester business, in which we are most interested, dropped from $11,044.50 in 1930 to $1,902.60 for the first half of 1931 when no hawkers and peddlers act was in force. Prorating his 1930 business this shows a drop of some 65% in Manchester. In the last six months of 1929 he showed a profit of $11,004.57 for the entire territory of western Massachusetts, Vermont and New Hampshire. His profits then fell to $10,384.30 for the entire year of 1930. Prorating his 1929 profits this shows a drop of 52% for the year 1930. For the first half of 1931, when the hawkers and peddlers act was not in force, Ratta's profits were completely eliminated and he showed a net loss of $627.66, or a drop of 112% from the preceding six months. His business was on the skids then before the hawkers and peddlers act was passed. That is the reason for his extra efforts and for hiring a new manager. He should not now be able to say that his loss was caused by the defendant's wrongful interference.

It must be kept in mind that the fee is exacted from the individual hawker and peddler. If the complainant pays the fees of his agents he does it under no legal obligation but as a volunteer. He cannot attribute his loss, if any, to the enforcement of this state

law against his agents. Such loss is attributable to his own choice of voluntarily assuming the obligations of his agents. The amount of these obligations is the total of the license fees he pays.

The district court found that by capitalizing an expenditure of three hundred dollars, which the complainant would pay for six licenses in Manchester, the amount would exceed three thousand dollars. The court applied this principle under the authority of *Western & Atlantic R. R.* v. *Railroad Commission*, 261 U. S. 264, 267. In that case however the court held if the injury to be enjoined is *permanent* the amount of controversy may be found by capitalizing the annual detriment from it. There is nothing permanent in the nature of the investment in the present case. The fees required are annual fees. The plaintiff may feel inclined to pay them this year and not next year. He may feel inclined to do business in New Hampshire this year and not next year. He may feel inclined to pay the fees this year and make his agents pay them next year. The legislature may abolish or diminish the amount of the fee. He has made no permanent investment which would enable the court to apply the principle of capitalization.

It is therefore submitted that the value of the subject matter in controversy does not exceed the sum of three thousand dollars and that the district court therefore failed to have jurisdiction.

B.

THE CLASSIFICATIONS UNDER THE PROVISIONS OF SECTION 3 OF THIS ACT DO NOT VIOLATE SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

I. The power which the legislature of the state of New Hampshire has exercised in its regulation of hawkers and peddlers is authorized by the police powers of the constitution.

Emert v. *Missouri*, 156 U. S. 296.
Baccus v. *Louisiana*, 232 U. S. 334.
Singer Sewing Machine Co. v. *Brickell and Alabama*, 223 U. S. 304.

Wagner v. *City of Covington*, 251 U. S. 95.
Town of Green River v. *Fuller Brush Co.*, C. C. A., 65 Fed. 2d, 112 (1933).
Ex parte Crowder, 171 Fed. 250.
State v. *Angelo*, 71 N. H. 224.
State v. *Montgomery*, 92 Me. 433.

II. The classifications are based on reasonable distinctions.

"A State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed * * *. If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law.'" *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 556.

See also:

Central Lumber Co. v. *South Dakota*, 226 U. S. 157, 160.
Quong Wing v. *Kirkendall*, 223 U. S. 59, 62.
Rast v. *Van Deman and Lewis*, 240 U. S. 342, 357.

The legislature has distinguished the method of selling as well as the articles sold. The act does not apply to "wholesalers or jobbers selling to dealers only, nor to commercial agents or other persons selling by sample, lists, or catalogues." The courts below held that this classification established an arbitrary exception.

Wholesalers, jobbers and commercial agents selling by sample, lists or catalogues make delivery of their merchandise subsequent to their order whereas the hawker and peddler delivers his articles contemporaneous with the order. The class excepted transacts their business with persons familiar with the goods sought to be sold and the opportunity for fraudulent sales is much less than in the case of direct sales to the uninformed and often gullible public. The legislature has believed that mischief exists in the latter type of cases. These distinctions are based on logic and fact and have been repeatedly sustained by the courts.

In *Wagner* v. *City of Covington*, 251 U. S. 95, 103, the court said:

> "The distinction between state regulation of peddlers and the attempt to impose like regulations upon drummers who solicit sales of goods that are to be thereafter transported in interstate commerce, has always been recognized."

Robbins v. *Shelby District*, 120 U. S. 489.
Crenshaw v. *Arkansas*, 227 U. S. 389, 396.
People v. *DeBlaay*, 137 Mich. 402, 405.
Hays v. *Commonwealth*, 107 Ky. 655; 55 S. W. 425.

The legislature has further classified in providing in section 3 that the act shall not apply to any person selling provisions, agricultural implements, fruit trees, vines, shrubs, books, newspapers, pamphlets, the products of his own labor or the labor of his family and the product of his own farm or the one which he tills, the manufacturers of furniture and ladders excepted.

In *State* v. *Montgomery*, 92 Me. 433, 441, the court discussed the question of the constitutionality of exceptions of fruit, fruit trees, provisions, live animals, brooms, agricultural implements, fuel, newspapers, books, pamphlets and agricultural products and said:

> "It is undoubtedly true that police regulations of this kind, to be valid, must be uniform, and must not discriminate against one class and in favor of another. * * * Is this right abridged by this statute? * * * We do not think so. If one may peddle freely the products of his own labor, so may all. The products may be unlike, but the freedom to prosecute one's own business and to peddle his own products is free alike to all. So of the other exceptions. While it may happen that various producers may peddle each the products of his own labor without license, but not of the labor of another, still we think this fairly answers the requirements of uniformity. The legislature is the sole judge of the extent to which the business of peddling should be regulated, and its conclusions are final, so

long as the burdens imposed do not bear unevenly upon citizens."

See also *Commonwealth* v. *Rearick*, 26 Pa. Sup. Ct. 384, 396, where the court held that the exception of manufacturers and producers selling their own products is constitutional.

People v. *DeBlaay*, 137 Mich. 402, 405, where the court held that the exception of manufacturers, farmers, mechanics or nurserymen selling their own products by sample or otherwise is constitutional.

In re D. C. Abel, 10 Idaho, 288, 292, where the court held that the exception of farm products was constitutional.

Kansas City v. *Overton*, 68 Kansas, 560, 565, where the court held that the exception of persons personally selling the products of their own or leased land is constitutional.

Commonwealth v. *Gardner*, 133 Pa. St. 284; 19 Atl. 550, to the same effect.

People v. *Sawyer*, 106 Mich. 428, 430; excepting mechanics and farmers selling their own products.

McKnight v. *Hodge* (Wash.), 104 Pac. 504, 506, where the court held constitutional the exception of agricultural and farm products and books, periodicals and newspapers.

State v. *Webber*, 214 Mo. 272; 113 S. W. 1054, where the court held constitutional the exception of pianos, organs, sewing machines, books, charts, maps and stationery, agricultural and horticultural products.

Ex parte Thornton, 12 Fed. Rep. 538.
Ex parte Crowder, 171 Fed. 250.

These cases and cases discussing the police powers of the state definitely establish the principle that the legislature has the power to determine how great the evil and the extent of the remedy. The question is a practical one dependent upon experience and one

which local experience should largely control. It is a question of policy for the legislature. *Tanner* v. *Little*, 240 U. S. 369.

If the legislature believes that those engaged in selling merchandise used in agriculture, such as agricultural implements, fruit trees, vines and shrubs, should not be regulated, it may be for either or both of two reasons (1) that persons engaged in the selling of such merchandise do not injure the public to the same degree that others do and (2) that more harm would be done to the public and the agricultural interests of our state by restraining the peddlers of agricultural products than would good be accomplished. It is a matter of policy for the legislature to decide.

> "It is more pressed that the act discriminates unconstitutionally against certain classes. But while there are differences of opinion as to the degree and kind of discrimination permitted by the Fourteenth Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the legislature to judge unless the case is very clear." *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U. S. 224, 227.

The district court in its opinion has pointed out what it terms illustrations of "the wholly unreasonable and arbitrary character of the classifications attempted under the provisions" of paragraph three and states that "They bear no relation whatever to the proper object or subject matter of such legislation, namely, the protection of the public. They result in an arbitrary and unequal application of restrictions to persons in legal status similarly circumstanced." (page 12 of the opinion). The circuit court of appeals added more illustrations to those of the district court and came to the same conclusion.

In the first place, if the delivery is made later and the article comes from without the state clearly this state could not regulate the sale of a vacuum cleaner by sample, list or catalogue. Secondly, the history of hawker and peddler legislation clearly shows that one of the mischiefs the statute purports to hit is the contempo-

raneous sale and delivery of articles which may have been purloined. The preamble of chapter 3 of the Province Laws of New Hampshire passed May 14, 1718 states:

> "Whereas Complaint is made of great Hurt to, and the decay of Trade occasioned by Hawkers, Pedlars and Petty-Chapmen, passing to and fro, through the Country, to vend Goods, Wares, and Merchandizes; much of which was Purloined, obtained by Robbery and Stealing, so that divers Men of Trades, Handicrafts men, and others, none of the best fame, having left off the exercise of their Trades, and Businesses, turn Hawkers, Pedlars, and Petty-Chapmen. For Remedy of which Mischief:"

If there exists an interval of time between the sale and delivery the housewife has an opportunity to consider the matter and to investigate the character and reputation of the salesman and his company as well as the source of the article. As we may infer from the preamble of the 1718 law this protection to the housewife is absent when sale and delivery are contemporaneous. The present legislation assures the housewife that the holder of a license has the qualifications which she could investigate if the delivery of the article were to be made subsequent to the order.

The district court states "Without a license one may peddle provisions which would presumably include food stuffs and groceries but may not without a license sell and deliver at the time bathroom fixtures, tooth brushes or combs." (Page 11 of the opinion) We are told that this is an arbitrary distinction. In the first place provisions are a necessity and any regulation regarding the right to sell them might deprive the people in our smaller communities of their necessities. In the second place peddlers of provisions and groceries generally have a regularly established route. Their customers can rely on them from their past experience. They are generally established retail merchants who, instead of setting up a store, practice their trades by calling from door to door at the invitation of their customers and thus provide a service for the housekeeper and the public. The court may take judicial notice of the fact that the sellers of bathroom fixtures, tooth brushes and combs do not sell the necessities of life nor does the general run of dealers of such articles customarily have a long established

trade. A company selling these articles may put on a drive undertaken by a number of high powered, unknown salesmen to comb the state but the butcher and grocer are known to their community and do not attempt to put over on a susceptible public a drive on meats and groceries.

The district court further states: "He may without a license * * * peddle fruit trees, vines, and shrubs, but to peddle fir trees, onion sets or annual plants for the garden, if not the product of his own farm, he must have a license." The Supreme Court of New Hampshire has not construed fruit trees, vines and shrubs. Conceivably these exceptions and "provisions" might include onion sets, tomato plants and other annual plants. Here again the legislature has apparently decided that it would not curb agricultural interests by restricting the sale of apple trees, pear trees and other fruit trees, which compose one of our basic agricultural interests. The evils, if any, existing in the peddling of such merchandise are out-weighed by the benefits derived from their unrestrained sale.

American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89, 92.

The courts object because a man may peddle wheelbarrows and hand sleds of his own manufacture but not a porch chair or a ladder. The exception of manufacturers of furniture and ladders to the general exception that one may peddle products of his own labor has been in our statute since 1897. Presumably peddlers of furniture and ladders worked an injury on the public. It may have been that the furniture and ladders sold by peddlers were unsafe, or that these peddlers were causing trouble in the state. At any rate it seems a matter for the legislature to determine whether the benefits from regulating peddlers of furniture and ladders are greater than the detriment to the public if unregulated.

The courts further object that "One may make children's toys or other articles and sell them without restriction but if he were to purchase the same class of articles from a neighbor he could not peddle them unlicensed." This is arbitrary according to the court. The distinction here is that one is not selling products of his own manufacture, of which the right to sell is clearly an incident. The hawker and peddler traditionally is a middleman, as the cases show, and unless he sells what he procures elsewhere is not a hawker and peddler. Regulation of the sale of the products

of one's own manufacture and growth and that of the family would discourage persons from making their own living with their own hands. Furthermore there is an assurance to the purchaser of the title of the goods sold.

It is submitted that these classifications are based on actual distinctions and are not unreasonable. Certainly uniformity exists in as much as all persons selling these products are exempt and all persons selling other products not covered by the exemptions are not exempt.

> "The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the State 'may be determined by degrees of evil or exercised in cases where detriment is specially experienced.' It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact. The only question is whether we can say on our judicial knowledge that the legislature * * * could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. Of course, this is especially true when local conditions may affect the answer, conditions that the legislature does but that we cannot know." *Dominion Hotel* v. *Arizona*, 249 U. S. 265, 268.

The district court and the circuit court of appeals in effect have held in this case that the legislature cannot subdivide hawkers and peddlers into further classifications for the purpose of regulating some and excepting others. They have in effect decided that the legislature cannot regulate the peddling of so called Oriental rugs, silks and French laces, the source and quality of which may be doubtful, unless it includes in the same regulation farmers who peddle their own products, the butcher and milkman going from door to door selling their necessities and the hominy and hull corn

man who has manufactured his own products. It is submitted that such a conception of the law is based neither on common sense nor legal experience.

The courts below relied on *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559. In the Connolly case combinations in restraint of trade were held illegal in an attempt by the legislature to abolish such practices. The legislature excepted agriculturists from the prohibition of such practices. In the present case the legislature is not seeking to abolish hawking and peddling but is seeking to regulate it. In the Connolly case the legislature permitted farmers to pursue exactly the same practices which others could not legally pursue. In this case all persons in each classification are treated alike. A vacuum cleaner peddler may sell his machine without a license if he manufactured it. Farmers must be licensed if they would sell vacuum cleaners. All persons in the same legal status and similarly circumstanced are treated alike.

C.

THE PROVISION OF SECTION 11 WHICH EXEMPTS DISABLED SOLDIERS AND SAILORS AND THEIR WIDOWS FROM PAYING LICENSE FEES DOES NOT VIOLATE SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This provision differs from that of *State* v. *Shedroi*, 75 Vt. 277; *Commonwealth* v. *Hana*, 195 Mass. 262; *Marallis* v. *City of Chicago* (June 24, 1932), 182 N. E. Rep. 394 and other similar cases because (1) *all* soldiers and sailors must obtain a license and (2) only *disabled* soldiers and sailors and their widows are exempt from paying a fee. The case of *State* v. *Montgomery*, 92 Me. 433, 442, is on all fours and the court in that case relied on the distinction between granting free licenses to *disabled* veterans and requiring other veterans to pay for their licenses. Such a classification was held constitutional by the Maine court. This is the trend of modern legislation on the subject.

In Massachusetts, in the case of *Commonwealth* v. *Hana*, 195 Mass. 262, the court intimated that an exemption of all veterans from payment of license fees was unconstitutional. The Massachusetts legislature now exempts from payment of the fee "any soldier or sailor resident in the commonwealth who served in the army or navy of the United States during the world war and received an honorable discharge or a release therefrom, and who is wholly or partly disabled by reason of wounds or injury received, or disease contracted during such service." (G. L. ch. 101, s. 24.)

The basic reason for the distinction between veterans and others is shown in the dissenting opinion of the three judges in the case of *Marallis* v. *City of Chicago*, 182 N. E. Rep. 394, in which case the exemption from payment of license fees of all soldiers and sailors regardless of disability was before the court. The dissenting opinion points out that (*p.* 399):

> "The power to grant bounty to former soldiers and sailors as a class is coeval with the organization of the government under the present Constitution and has been continued without interruption to the present time. *United States* v. *Hall*, 98 U. S. 343, 25 L. Ed. 180. * * * Of course, there is no relation between the service of a soldier and the business of a peddler, but there is a relation between the duty of the sovereign growing out of the service of a soldier and the granting of privileges to him which will enable him to provide for his daily needs. That relation has been made the basis of a great deal of legislation of this character by both federal and state governments."

The dissenting opinion further justifies the classification by pointing out that many of the veterans while in the service were in the formative period of their lives, their work and studies were definitely interrupted, while those remaining at home enjoyed (*p.* 399):

> "exceptional and unprecedented opportunities for gainful employment. The soldiers came home handicapped by absence from business and schools and burdened with the baneful effects of tremendous inflation of values which set in soon after their discharge. Under the circumstances it seems

apparent that they constituted a distinct class quite competent to be distinguished from the rest of our citizenry in matters of legislation—a class created by their defense of country and the consequent deprivation of opportunity which had been open to others."

The reason for the second distinction is the physical infirmity which a disabled veteran has received while serving his country. *State* v. *Montgomery*, 92 Me. 433. No such distinction existed in the cases relied on by the court and counsel for the complainant. The disabled veteran by reason of service to his country is physically handicapped in the pursuit of his trade of hawking and peddling whereas the ordinary person suffers under no such disadvantage. The extension of the effects of this disability to the widow is based on the same policies and logic. She has shared equally in the effects of the disability of her husband so far as her husband's ability to make a living for his family is concerned.

The state of New Hampshire has provided for its disabled veterans. They have been given bonuses (Laws of 1919, chapter 140 and Special Session 1919, chapter 1). Special legislation is provided for the indigent (Public Laws, chapter 106). The state pays the expenses for their decent burial (Public Laws, chapter 106, section 20). Veterans are exempt from the payment of a poll tax in common with other persons who by reason of age, infirmity and poverty are unable to contribute towards the public charges (Public Laws, chapter 60, sections 2 and 4). Those holding not over five thousand dollars worth of real estate are entitled to a property tax exemption on the first one thousand dollars (Public Laws, chapter 60, section 26). The New Hampshire Soldiers Home is provided for the destitute (Public Laws, chapter 106, section 19). Veterans over seventy years of age may have a free hunting and fishing license (Public Laws, chapter 202, section 5).

D.

THE PROVISION EXEMPTING RESIDENTS OF THIS STATE OVER THE AGE OF SEVENTY FROM PAYING LICENSE FEES DOES NOT VIOLATE ARTICLE 4, SECTION 2 OF, AND SECTION 1 OF, THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The reason for this exemption is to give assistance to persons over the age of seventy who are presumably handicapped in their trade by reason of their age. The district court decided that this exemption violated section 1 of the fourteenth amendment and section 2 of the fourth amendment to the Federal Constitution and stated that this particular provision "is seemingly of no great practical importance as few persons of that age would be engaging in such employment." (Page 7 of opinion). The opinion of the circuit court of appeals was to the same effect.

The legislature has classified residents over the age of seventy for the purposes of poll tax exemption (Public Laws, chapter 60, section 1) and old age assistance (Laws of 1931, chapter 165). Persons over seventy of course do suffer under a disability to practice the trade of hawking and peddling and for that reason the exemption bears a relation to the purpose of the act. The chief objection seems to be that only residents of this state over seventy are exempt from payment of the license fee. The answer to this objection is, it is the state of New Hampshire who has to take care of its indigent and old folks. This provision however is trivial and if unconstitutional the court should construe it so as to enable any citizen of any state over seventy to procure a free license. The New Hampshire Supreme Court has so construed a similar provision in *Bliss's Petition*, 63 N. H. 135 where the court granted a peddler's license to a citizen of Massachusetts under a statute which permitted the clerk of the Supreme Court to grant a license "only for that county in which said person or applicant so applying holds his residence * * *." The court said (page 135):

> "The equality of privileges and immunities guaranteed by the federal constitution (art. 4, s. 2) to the citizens of each state, exempts them from any higher taxes than the state imposes upon her own citizens. The petitioner, being en-

titled to all the privileges and immunities belonging to the citizens of the several states, is entitled, within this state, to all the rights and privileges of our own citizens, and he may sell, or offer or expose for sale, here, anything which the citizens of this state can sell, offer, or expose for sale, upon the same terms and conditions, and subject to the same duties and liabilities, as the permanent residents of this state."

See also:

Quong Ham Wah Co. v. *Ind. Acc. Comm.* (Cal. 1920) 192 Pac. 1021; 12 A. L. R. 1190, 1200.

E.

IF EITHER OR BOTH CLASSES OF EXEMPTIONS AND ANY OF THE EXCEPTIONS ARE UNCONSTITUTIONAL THE REMAINDER OF THE ACT STANDS.

In the case of *State* v. *Stevens*, 78 N. H. 268, 269 the court said:

"The only provision attacked is the final clause of section 3 that such agents shall be residents of the state. But this provision is not a necessary element of the scheme of regulation provided. * * * The result, if this clause is void, therefore would not be to invalidate the whole act and permit all persons to sell without license, but merely to render nugatory that portion of the act."

See also:

East Kingston v. *Towle*, 48 N. H. 57.
Opinion of Justices, 76 N. H. 601, 605.
Bliss's Petition, 63 N. H. 135.

The cases seem to establish clearly that the method to determine whether or not the entire act should be stricken down depends on whether the legislature would be presumed to have enacted

the valid portion without the invalid. In other words is it fair to believe that the legislature would have enacted the present hawkers and peddlers law without the exemptions provided in section 11 if the legislature had known that it was without the power to make these exemptions? It seems clear that the exemptions are but a detail of the act and that the act can be enforced to carry out its purpose without the exemptions provided in section 11.

Consider the legislation on the subject. From early colonial days and from prior to 1688 hawkers and peddlers have been regulated in the province and state of New Hampshire. The fact that such regulation has been exercised for such a long period of time shows the importance of such legislation. The legislature has attempted to regulate the practice of this profession for the purpose of protecting the people of the state. Free licenses are secondary to the primary purpose of the act which is to protect the public. And that protection is not affected by the fact that certain persons are given free licenses and others are not.

The statutory history is of still further significance in indicating the legislative intention. Both of these exemptions from payment of license fees were added to an already existing hawkers and peddlers act by the process of amendment. The aged persons' exemption was added to the hawkers and peddlers act in 1925 by chapter 153, section 1. The present disabled veterans' exemption was added to the hawkers and peddlers act in 1919 by chapter 24, section 1. The original disabled veterans' exemption was added to the hawkers and peddlers law in 1893 by chapter 65, section 5. The history of these exemptions shows that the aged persons' exemption is eight years old and the disabled veterans' exemption is forty years old. Both exemptions were placed in the act by the process of amendment. Both of them were mere details and unnecessary to valid and workable acts previously in force. Until these amendments were added and for a period of over two hundred years satisfactory, workable acts regulating the hawkers and peddlers profession were in force. The amendments involved only the matter of free license fees and in no wise changed the substance and manner of the police regulations. The most reasonable conclusion to be drawn therefore is that the legislative exercise of the police power should remain in force regardless of what the court may do with the two exemptions from payment of license fees.

Similarly if the exception of manufacturers of furniture and ladders is unconstitutional it seems impossible to believe that the legislature would prefer the entire act stricken down because of the invalidity of this exception. Without it the act as a whole is enforceable and substantially conforms to the intention of the legislature. If, as the courts below have decided, all the exceptions in section three are invalid then unquestionably the act as a whole is unconstitutional but such exceptions as manufacturers of furniture and ladders and persons selling fruit trees, vines and shrubs are of minor importance and, even if void, should not thereby render the entire act void.

We respectfully submit that the decrees of the circuit court of appeals and of the district court should be reversed and that the bill in equity should be dismissed, with costs.

MICHAEL J. HEALY, Chief of Police
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 731

MICHAEL J. HEALY,
Chief of Police of the City of Manchester, New Hampshire
Appellant

v.

LOUIS D. RATTA,
Appellee

BRIEF FOR THE APPELLEE

"It is quite common in these latter days for certain classes of citizens — those engaged in this or that business — to appeal to the government — national, state or municipal to aid them by legislation against another class of citizens engaged in the same business but in another way. This class legislation, when indulged in seldom benefits the general public, but nearly always aids the few for whose benefits the general public, but not nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many for whose benefit all legislation should be, in a republican form of government, framed and devised." Chaddock *v.* Day, 75 Mich. 527 (1889).

STATEMENT OF THE CASE

This is an appeal under the provisions of the United States Code, Title 28, *s.* 347, paragraph (b), Judicial Code, *s.* 240, as amended by act of February 13, 1925, from a decree of the Circuit Court of Appeals for the First Circuit affirming a decree of the United States District Court for the District of New Hampshire enjoining the enforcement of the so-called New Hampshire Hawkers' and Peddlers' Act (1931 Session Laws of New Hampshire, Ch. 102) on the ground that that act is in contravention of the provisions of Article IV, *s.* 2 and Article XIV of the amendments to the Constitution of the United States.

The appellee (hereinafter referred to as the plaintiff) filed on November 4, 1931, a bill in equity in the United States District Court for the District of New Hampshire against the appellant (hereinafter referred to as the defendant) (Record, *p.* 1). The bill as finally amended set forth the State statute in full (Record, *pp.* 10-14), and alleged the necessary jurisdictional amount to be in controversy (Record, *p.* 18). The bill alleged that the plaintiff, a resident of Massachusetts was at the time of the filing of said bill, and had been for several years, a distributor of certain appliances throughout the States of New Hampshire and Vermont (Record, *p.* 1); that at the time of the filing of said bill he was and for sometime had been carrying on a similar business in Massachusetts, and maintaining an office there, from which he conducted his New Hampshire and Vermont business (Record, *p.* 1); that he sold goods at wholesale to dealers in all three states for resale by such dealers, and also personally sold such goods himself at retail, and that such retail sales were within the provisions of the New Hampshire statute in question (Record, *pp.* 1, 2, 10-14). The bill also related the plaintiff's negotiations with the various state officials, including the Secretary of State, the Attorney-General and the defendant, in an attempt to evolve a workable selling plan that would avoid all controversy with the state authorities (Record, *pp.* 3-5), and set out the defendant's plan, under instructions from the Secretary of State, to arrest and prosecute the plaintiff and his dealers in case of any attempt to sell by house to house canvassing, under and in accordance with the provisions of said New Hampshire statute (Record, *pp.* 5, 6). The bill further pointed out that said New Hampshire statute is in contravention of the provisions of Article IV, *s.* 2 of, and Article XIV of the amedments to the Constitution of the United States (Record, *pp.* 6, 7); pointed out that the plaintiff's New Hampshire business centered in Manchester, New Hampshire, and that as a result of the enforcement of the statute the defendant had suffered and would continue to suffer irreparable loss (Record, *pp.* 4, 8), unless the defendant and the other members of the Manchester city police force should be enjoined from enforcing said statute.

The bill prayed for an injunction, and also for a temporary restraining order, and for an order to show cause why a preliminary injunction should not issue pending a determination

of the case (Record, *p.* 9). Subsequently, on March 26, 1932, the plaintiff waived his prayers for temporary relief. These prayers were never pressed and the case was heard on its merits, and on the plaintiff's prayers for permanent relief, before the District Court, as above indicated, on June 14, 1932. The District Court, apparently overlooking the decisions in *Smith* v. *Wilson*, 273 U. S. 388, 391, and *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10, 15, purported to organize and sit as a statutory court under the provisions of Section 266 of the Judicial Code as amended, United States Code, Title 28, *s.* 380.

On November 29, 1932, the District Court entered a decree enjoining the defendant and his officers from enforcing the Act against the plaintiff and his dealers in connection with their sale of Air-Way vacuum cleaners and parts (Record, *pp.* 26, 27). The defendant's appeal to the Supreme Court of the United States was dismissed on the ground of want of jurisdiction, 289 U. S. 701. The defendant thereupon appealed to the Circuit Court of Appeals for the First Circuit, which handed down an opinion on November 10, 1933 and affirmed the decree of the District Court with costs (Record, *pp.* 44-50). The defendant is now appealing to this Court from said decree of the Circuit Court of Appeals for the First Circuit and relies on the following assignments of error (Record, *p.* 51):

> "1. The court erred in holding that the statute of the state of New Hampshire enacted April 14, 1931 entitled 'An Act Relating to Hawkers and Peddlers' is in entirety in contravention of the Constitution of the United States, especially of article IV, section 2 and of the fourteenth amendment to said Constitution and therefore is in entirety unconstitutional and void.
>
> "2. The court erred in holding that section 3 of said act is in contravention of the Constitution of the United States, especially of article IV and section 1 of the fourteenth amendment to said Constitution.
>
> "3. The court erred in holding that section 11 of said act is in contravention of the Constitution of the United States, especially of article IV, section 2 and of section 1 of the fourteenth amendment to said Constitution.

"4. Because of the aforementioned errors the court erred in refusing to grant the motion filed by the defendant to dismiss the bill in equity."

The defendant no longer questions the jurisdiction of the United States Court, but in his appeal to the Circuit Court of Appeals he claimed that the District Court had no jurisdiction "because the value of the subject matter in controversy does not exceed the sum of three thousand dollars" (Record, *p.* 43), and this Court in its order of February 5, 1934, noting probable jurisdiction, directed the attention of counsel to the question of "whether the amount in controversy is such as to sustain the jurisdiction of the District Court" (Record, *p.* 54). We will, therefore, deal with this preliminary question of jurisdiction before taking up the defendant's assignments of error.

ARGUMENT

I.

THE AMOUNT IN CONTROVERSY IS SUFFICIENT TO SUSTAIN THE JURISDICTION OF THE DISTRICT COURT.

It is to be noted at the outset that the plaintiff's bill as amended alleged among other things "that this controversy involves in excess of three thousand dollars ($3,000), exclusive of interests and costs" (Record, *p.* 18). The decree appealed from in this case affirmed the decree of the District Court (Record, *p.* 50) and the decree of the District Court contained the finding "that the allegations of the plaintiff's petition are true;" (Record, *p.* 26). Further findings of the District Court and the Circuit Court of Appeals as shown in their respective opinions appear at pages 20, 21, 47 and 48 of the record.

The law on this point seems to be clear. As pointed out in the opinions in the lower courts in these cases, the jurisdictional amount is in controversy if the controversy involves a business or business loss of the worth of $3,000. *Packard* v. *Banton,* 264 U. S. 140, 142, 68 L. Ed. 596; *Campbell Et Al* v. *City of Maryville,* 31 Fed. 2nd 466, 467; *Western & Atlantic Railroad* v. *Railroad Commission,* 261 U. S. 264, 267. The concurrent findings of the courts below that $3,000 was in controversy in this

case within the meaning of these cases, is amply sustained by the evidence. It is, in fact, doubtful if any other finding could be supported on the evidence. A state license fee for each agent costs $50, and a license fee for a city the size of Manchester costs $50 (Record, *p.* 12). The evidence shows that in order to do business with the necessary degree of freedom it is necessary for each agent to take out a state license (Record, *pp.* 28, 29). The number of dealers actually employed in Manchester is, of course, a variable figure because of the large turnover. At the time of the trial Mr. Clement had employed 26 salesmen since he came to Manchester in November, 19[illegible], who had since left the employ of the company (Record, *p.* 32). He had still left in his employ salesmen working from his office but outside of Manchester to the number of 17, and salesmen selling partly in Manchester to the number of six (Record, *p.* 32, — Haessler's Affidavit, SCHEDULE II, — Record, *p.* 39). These license fees would have to be paid by Ratta personally. In all their experience under the act neither he nor Mr. Clement had ever succeeded in getting any salesmen to buy a license (Record, *pp.* 29, 31, 33). Even if these licenses were not paid for by him directly, the cost would eventually fall on his shoulders because it necessarily follows that if the salesmen had to pay these license fees Ratta would have to make up the amount either by enlarged commissions or in some other way. Licenses for the average number of men selling in the City of Manchester since the act went into effect would cost at the rate of more than $300 a year (Record, *p.* 39). This amount would be increased because of the fact that the number of salesmen varies so that at times more than six are employed and because of the large turnover, more than six would necessarily be employed during the course of the year (Record, *pp.* 31, 32). In addition to this, Manchester is the training field for New Hampshire salesmen (Record, *pp.* 29, 30) so that still more licenses would be required in order to comply with the act in the City of Manchester. It requires no argument to show that on these facts alone Mr. Ratta's cost of doing business in Manchester alone is increased by at least $350. This figure, capitalized at a reasonable rate shows a loss in the value of his business in an amount at least twice the jurisdictional amount. It is unnecessary to go farther to show that this Court has jurisdiction under the authorities. *Campbell Baking Company* v. *City of Mary-*

ville, supra; Western & Atlantic Railroad v. *Railroad Commission, supra.*

The evidence shows, however, that the jurisdictional amount is equally involved on account of the increased cost of doing business in Manchester since the passage of, and the attempt to enforce, the act. This action will benefit Mr. Ratta in more than one way. When this action was brought Mr. Ratta not only needed relief from the activities of the enforcing officers, he needed an analysis of his business, and this action has resulted in giving it to him. It is apparent from his testimony and from Mr. Haessler's analysis of the figures that Mr. Clement knew more about the exact effect of the enforcement of the act on Mr. Ratta's Manchester business than Mr. Ratta did. It now turns out that Mr. Ratta was mistaken in his general statements that business in Manchester had declined since the middle of 1931 and that business elsewhere had held up fairly well, and that Mr. Clement was correct in his statements that business in Manchester for the second six months was about the same (Record, *pp.* 33, 38) but that as a result of the act and the new method of selling made necessary thereby, the cost of doing business in Manchester had tremendously increased because of the increased overhead, more telephone calls, larger advertising costs, and road expenses (Record. *p.* 33). Mr. Ratta did succeed in keeping his Manchester business up but only by tremendous efforts. He changed his manager and in addition, he devoted himself largely to this territory. Previous to the enactment of the new statute Mr. Ratta had handled his Western Massachusetts territory from his Springfield, Massachusetts office and had made a trip to Manchester, Northern New Hampshire, and Vermont to keep in touch with his local representatives and keep the business going, on the average of once a month (Record, *p.* 34). Since the enactment of the statute and the attempt to enforce it in New Hampshire, he has had to largely neglect his Massachusetts business and concentrate on Manchester (his most fertile field. — Record, *pp.* 34, 35) in order to keep his business up (Ratta's Affidavit, *pp.* 1, 2). He has continued to make his monthly trips through the balance of the state and through Vermont, but in addition, he has had to make not less than two additional trips a month to the City of Manchester (Record, *pp.* 34, 35).

We would know without figures that Mr. Ratta and Mr. Clement were both right when they testified that the deterring effect of the statute was tremendous, — that it necessarily resulted in a sales resistance that made it much more difficult to do business (Record, *pp.* 28, 29, 30, 32, 33, 34, 35) but an analysis of the figures demonstrates the truth of this statement as applied to Mr. Ratta's business beyond the possibility of all doubt, as appears from SCHEDULE II of Mr. Haessler's Affidavit and Haessler's analysis thereof (Record, *pp.* 39, 41).

As a result of Mr. Ratta's tremendous activity in Manchester he actually increased his Manchester business in the last half of 1931 over the first half of 1931 by $26.45, the difference between $1,929.05 and $1,902.60 (Record, *p.* 38). As Mr. Ratta tells us in his affidavit, in order to effect this result he had, to a large extent, to neglect his Massachusetts business, and the figures show it. His gross sales in Massachusetts fell from $12,822.90 in the first half of 1931 to $3,028.42 in the last half of 1931, — a decrease of approximately 75% (Record, *p.* 38).

Vermont and the balance of New Hampshire (that part of New Hampshire lying outside of the City of Manchester) were receiving from Mr. Ratta practically the same attention (one trip a month) during the latter half of 1931 as during the first half of 1931, and a comparison of the results in Vermont during these periods and the results in New Hampshire where the hawkers and peddlers act changed the situation conclusively demonstrates the correctness of Mr. Ratta's and Mr. Clement's testimony that activities under the hawkers and peddlers act and not the depression did have a tremendous effect on the business of house to house selling (Record, *pp.* 34, 38, 39, 40, 41).

In Vermont, where conditions remained the same so far as statutory regulations are concerned, gross sales fell from $26,195.10 in the first half of 1931 to $18,216.50,—a loss of aproximately 31% (Record, *pp.* 38, 41). In New Hampshire (outside of Manchester where increased effort and expense was put into the business) gross sales decreased from $26,054.80 during the first half of 1931 to $11,948.55,—a decrease of approximately 58% (Record, *pp.* 38, 41). Add to this the experience of the four salesmen who transferred from New Hampshire to Vermont in 1931 (Haessler's SCHEDULE III, Record, *p.* 39) and the case is complete. These salesmen were all selling on both sides

of the line. Most of their business during the first half of 1931 was on the New Hampshire side. During the last half it was practically all done in Vermont (Record, *pp.* 30, 32, 39).

Briefly, then, the situation is this. By neglecting his Massachusetts business and concentrating on Manchester, Ratta, at the expense of a 75% decrease in his Massachusetts business, by increased labor and expense on his part, and by employing a more expensive manager (Record, *pp.* 35, 36), managed to hold his Manchester business in spite of the act. During this same period sales in Vermont, where conditions remained the same, decreased approximately 31%, and in New Hampshire, outside of Manchester, with the same expenditure of time and energy on Mr. Ratta's part, sales decreased 58% (Record, *pp.* 39, 41). Under these circumstances it is fair to assume that had the local authorities not attempted to enforce the hawkers and peddlers act in New Hampshire the business outside of Manchester would have decreased like that in Vermont, in the neighborhood of 31% instead of 58%, and that the additional effort and expense put into the City of Manchester alone accounts for the continued volume of business there for the latter half of 1931. Ratta did manage to keep up his Manchester business, but at what a tremendous cost. He had to make not less than two additional trips a month to Manchester at an expense of approximately $70 a month (Record, *pp.* 34, 35). He had to hire a new manager at an increased cost of somewhere between $5 and $20 a week (Record, *pp.* 35. 36). The increased cost of doing business in Manchester as a result of the passage of this act and the activity of the local enforcement officers was at least $100 a month. Capitalizing this figure, it is apparent that the act has decreased the amount of Mr. Ratta's Manchester business by a sum many times the amount necessary to give the District Court jurisdiction.

II

THE NEW HAMPSHIRE STATUTE IS UNCONSTITUTIONAL.

(Defendant's first, second, third and fourth assignments of error.)

A. General Principles Applicable to All Assignments.

It is of course elementary that the New Hampshire State Constitution does not authorize the levying of an excise tax. *State* v. *Express Company*, 60 N. H. 219. The license statute in question must be sustained, if at all, as a valid exercise of the police power.

Granted that the state in the exercise of its police power has the undoubted right to enact wholesome legislation to promote the public health, the public morals or the public safety, it has not the right under the guise of a police regulation to deprive any man of the equal protection of the laws or to take his property without due process of law. *Mutual Loan Company* v. *Martell*, 222 U. S. 225; *C. B. & Q. Ry.* v. *Drainage Comm'rs.*, 200 U. S. 561; *Real Silk Hosiery Mills* v. *Bellingham*, 1 Fed. 2nd 934; *Truax* v. *Raich*, 239 U. S. 33; *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278; *Real Silk Hosiery Mills* v. *Portland*, 297 Fed. 897, 268 U. S. 325.

To avoid the prohibition of the Federal Constitution the Act must be designed to promote the public health, welfare or safety, and the court must be able to see that the various provisions of the statute have such tendency, and that the various exceptions and distinctions between classes and modes of conducting business bear a real and substantial relation to some legitimate purpose of the statute.

> "The police power of the state extends only to such measures as are reasonable, and the general rule is that all police regulations must be reasonable under all circumstances. In every case it must appear that the means adopted are reasonably necessary and appropriate for the accomplishment of a legitimate object falling within the domain of the police power. A statute to be within this power must be reasonable in its operation upon the persons whom it affects, and not unduly oppressive. The validity of a police regulation therefore primarily depends on whether under

all the existing circumstances the regulations is reasonable or arbitrary and whether it is really designed to accomplish a purpose properly falling within the scope of the police power." 6 R. C. L. *Page* 236, § 226.

"In *Chicago, Burlington & Quincy Ry. Co.* v. *Drainage Commissioners,* 200 U. S. 561, 592, it was said that 'the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety,' and that the validity of a police regulation 'must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose." *Mutual Loan Company* v. *Martell,* 222 U. S. 225, 232.

"If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt." *Chicago, Burlington and Quincy Railway Company* v. *Drainage Commissioners,* 200 U. S. 561, 593.

The large apparent conflict of authority as to what discriminations and classifications can be made in so-called hawkers' and peddlers' acts is, to a large extent, no conflict at all, because so many of the questioned statutes have been passed under state Constitutions which permit excise taxes; and other decisions, apparently authorizing discriminations and distinctions which bear no relation to any legitimate police power purpose, are apparently based on a failure to distinguish between the power to classify and discriminate under the tax power, and the right to discriminate and classify under the police power. Because of this, any attempt to discuss, distinguish, or build upon the large volume of cases in which similar statutes have been discussed is really beside the point. As pointed out by the Supreme Court of the United States in *Chicago, Burlington & Quincy Railway Company* v. *Drainage Commissioners, supra;* and *Mutual Loan*

Company v. *Martell, supra,* the principle is clear. It is equally clear that a classification or discrimination may bear a direct relation to a revenue raising purpose, and bear no such relation to a legitimate police power purpose. Discriminations and classifications can be made for tax purposes, that would be altogether invalid under a statute which must be sustained solely upon the power of the state to enact legislation to promote the public welfare. As was said by the Supreme Court of the United States in *Connolly* v. *Union Sewer Pipe Company,* 184 U. S. 540, 560:

> "The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification 'must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' *Gulf, Colorado and Santa Fe Railway* v. *Ellis,* 165 U. S. 150, 155, 159, 160, 165."

And again at pages 562 and 563:

> "A State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations

> control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely aribtrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

B. The Defendant's Second Assignment of Error — The Provisions of Section 3 of the Statute.

Within the principles discussed, *supra pp.* 9-12 the New Hampshire statute is clearly unconstitutional as providing arbitrary selection rather than reasonable classification. Section 3 provides:

> "The provisions of this chapter relating to hawkers and peddlers shall not apply to wholesalers or jobbers selling to dealers only, nor to commercial agents or other persons selling by sample, lists, or catalogues, nor to any person selling provisions, agricultural implements, fruit trees, vines, shrubs, books, newspapers, pamphlets the products of his own labor or the labor of his family and the product of his own farm or the one which he tills, the manufacturers of furniture and ladders excepted."

A mere reading of the section suffices to show its arbitrary and unreasonable distinctions and classifications. One cannot read it

with any care without being convinced that the section is made up of compromise provisions and based on a desire to protect local merchants rather than any attempt to protect the purchasing public. It is squarely within the language quoted from the opinion of the Michigan court in *Chaddock v. Day, supra,* at the head of this brief; and unconstitutional for the reasons stated in the opinions below (Record, *pp.* 21-26, 49, 50).

Under this section A may peddle the toys which he makes, but his next door neighbor B may not buy them from him and sell them in the same territory without first qualifying for, paying for, and obtaining a license; in the same way A may peddle the toys which he makes, but his neighbor B must procure a license in order to peddle the ladders and chairs which he makes; A may sell fruit trees, vines and shrubs no matter where he obtains them, but neither he nor B can sell evergreen trees, strawberry plants or annual plants without first obtaining a license; A may freely peddle the apples which he raises on his own farm, but his next door neighbor, who buys them from him, cannot peddle these same apples without first procuring a license; A may sell any kind of an agricultural implement without a license, but B cannot sell a vacuum cleaner or an electric toaster without first obtaining a license; A may freely sell books, newspapers and pamphlets, but B must have a license to sell his magazines; A may freely travel from door to door and sell any article by sample, lists, or catalogues, without let or hindrance, but B cannot travel from door to door and sell the same article and make immediate delivery, without first procuring a license.

As pointed out in the opinions below, the attempted distinctions and classifications of this section of the New Hampshire statute are plainly arbitrary and unreasonable, and have no tendency to promote any legitimate police power purpose. Rather do they furnish a fine example of an attempt to protect local merchants under the guise of a police power regulation. It requires no argument to show that the public health, safety or morals (nobody and nothing, in fact, but the local dealer) are not protected or promoted by a provision which allows the manufacturer to peddle the articles which he makes, but forbids his employe or neighbor to do the same thing. No more does it require argument to show that there is more possibility of fraud in the sale of fruit trees than in the sale of evergreen trees. The

man who purchases the apple tree may spend his money and wait for years to find that the fruit is not true to name, while the purchaser of the evergreen tree knows when he sees it what he is getting and whether it is what he intended to buy. Yet this act purports to protect the buyer of the evergreen tree and leaves the purchaser of the fruit tree at the mercy of any irresponsible party who undertakes to peddle them from door to door. The manufacturer of jumping jacks and air rifles can peddle his goods throughout the community at will, but the manufacturer of furniture must first procure a license before he can peddle such every day necessities as kitchen stools and chairs. Of course this distinction is not required by and was not made for the purchasing public. No more can it be said that there is less liability of fraud in the sale of agricultural implements than in the sale of household implements. Common knowledge based on experience teaches us that there is at least as much danger of fraud in the sale of insulage cutters and farm wagons made of inferior materials and poorly put together as in the sale of percolators and vacuum cleaners. The distinction between books, newspapers and pamphlets on the one hand, and magazines on the other is equally absurd; and the distinction between demonstration and delivery on the one hand and sale by sample, lists and catalogues on the other is the worst monstrosity of all. The man who has a chance to view the products, to accept immediate delivery and know that he is purchasing just what he has seen and what has been demonstrated to him is protected under the provisions of this statute and his neighbor is left at the mercy of the fly-by-night irresponsible who shows him a picture of one thing and delivers him something else that may or may not be something like it. If anybody is protected by this provision or by any of the distinctions above referred to in this statute, it certainly is not the purchasing public. The local dealer in ladders and furniture is protected by this statute, but the buying public are affected only to the extent that their ladders and furniture must necessarily cost more because of the increased burden placed on the house to house canvasser by reason of this statute. That portion of the public which is willing to rely on the smooth tongued rascal who is afraid to demonstrate his goods and deliver the article demonstrated is left at the mercy of any irresponsible who may pursuade him to buy, and the conservative citizen who

insists on an actual demonstration of the very article purchased must pay the additional cost provided for by the licensing feature of this statute.

Fortunately the framers of our Federal Constitution and the amendments thereto have protected us against this kind of class legislation. Arbitrary distinctions cannot be made. In re *Yot Sang*, 75 Fed. 983. The police power does not require or allow for an arbitrary distinction between one who acquires his goods by purchase and one who makes or otherwise produces them himself. *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540. Our constitutional right to freedom of contract and to freely choose our employment cannot thus be arbitrarily interfered with. *Truax* v. *Raich*, 239 U. S. 33, 41. Such arbitrary distinctions cannot be sustained as within the police power. *Real Silk Hosiery Mills* v. *Bellingham*, 1 Fed. 2nd 934. An arbitrary distinction between articles harmless in themselves cannot be made. *State of Oregon* v. *D. Y. Wright*, 100 Pac. 296, 21 L. R. A. (N. S.) 349; *Watson* v. *State of Maryland*, 218 U. S. 173; *Lindsley* v. *Natural Carbonic Gas Company*, 220 U. S. 61; *Dobbins* v. *Los Angeles*, 195 U. S. 223.

C. The Defendant's Third Assignment of Error — The Exemptions Provided by Section 11 of the Statute.

Section 11 exempts from the payment of a license fee:

> "Any soldier or sailor disabled in any war in which the United States has been engaged, or by sickness or disability contracted therein or since his discharge from the service because of such service, and the widow of any such soldier or sailor so long as she remains unmarried, or any citizen of this state over seventy years of age."

This exemption of three classes of persons from the payment of the license fee is so clearly within the prohibition of Section 1 of the XIVth Amendment to the Federal Constitution as to require but brief argument. No legitimate purpose of the statute is subserved by this exemption and it clearly discriminates against the plaintiff. The state cannot reward its soldiers for services performed in behalf of this country (or in behalf of some other

country,—the statute includes soldiers engaged against as well as in behalf of the United States) in this way. *State* v. *Shedroi*, 75 Vt. 277, 54 Atl. 1081; *State* v. *Garbroski*, 111 Iowa 496, 56 L. R. A. 570; *State* v. *Whitcomb*, 122 Wis. 110, 99 N. W. 468; *Commonwealth* v. *Hana*, 195 Mass. 262. *Marallis* v. *City of Chicago et al.*, 349 Ill. 422, 182 N. E. 394. No more can it reward their widows either because they are widows of deceased soldiers or because they remain unmarried. It requires no argument to show that the exemption of the soldier and his widow is not designed to and cannot in any way protect or promote the public health, safety or morals. The public is equally protected whether he or she pays a license fee or not.

And then to cap the climax the legislature provides, in direct contravention of the provisions of Section 2, Article IV of the Federal Constitution, that no license fee shall be required of "*any citizen of this state* over seventy years of age." It requires no argument to show that this exemption is in contravention of this provision of the Federal Constitution. It requires no argument to show that the plaintiff has to compete with a seventy year old New Hampshire citizen, and that he is therefore prejudiced by this provision. *Chalker* v. *Birmingham and Northwestern Railway Company*, 249 U. S. 522; *State* v. *Lancaster*, 63 N. H. 267; 37 C. J. 205; *Commonwealth* v. *Hana, Supra.*

D. The Defendant's First and Fourth Assignments of Error — The Act is Not Severable. The Provisions of Section 3 and 11 Vitiate the Whole Statute.

That the plaintiff is prejudiced by the unconstitutional features of the New Hampshire statute is undoubted. Where he has to procure a license his competitor may not. Where he has to pay a license fee his competitor may not.

The defendant's claim that the act is severable and that even if some features of the act are unconstitutional, the balance of the act must stand, is untenable. There certainly is no evidence of any intention to require a license of the man who manufactures and peddles toys, of the man who grows and sells fruit trees, of the man who sells agricultural implements or the products of his own farm; there is no intention to require a license of the man who sells by sample, lists or catalogues or of the man who sells

books, newspapers or pamphlets. If these unconstitutional exceptions are eliminated and the balance of the act is allowed to stand, it will require these burdensome licenses from those whom the statute intended to protect from them. Neither does the act evidence any intention of requiring a license tax of soldiers (German or American) or their unmarried widows, or of citizens of this state over seventy years of age. If Section 11 is eliminated because of its unconstitutionality, and the balance of the act is allowed to stand, these people whom the legislature did not wish to pay a license fee under any circumstances will necessarily have to pay. See District Court Opinion (Record, *p.* 26). The act is not severable, its unconstitutional features cannot be separated from the rest and the balance of the act allowed to remain in force. The act must fall as a whole.

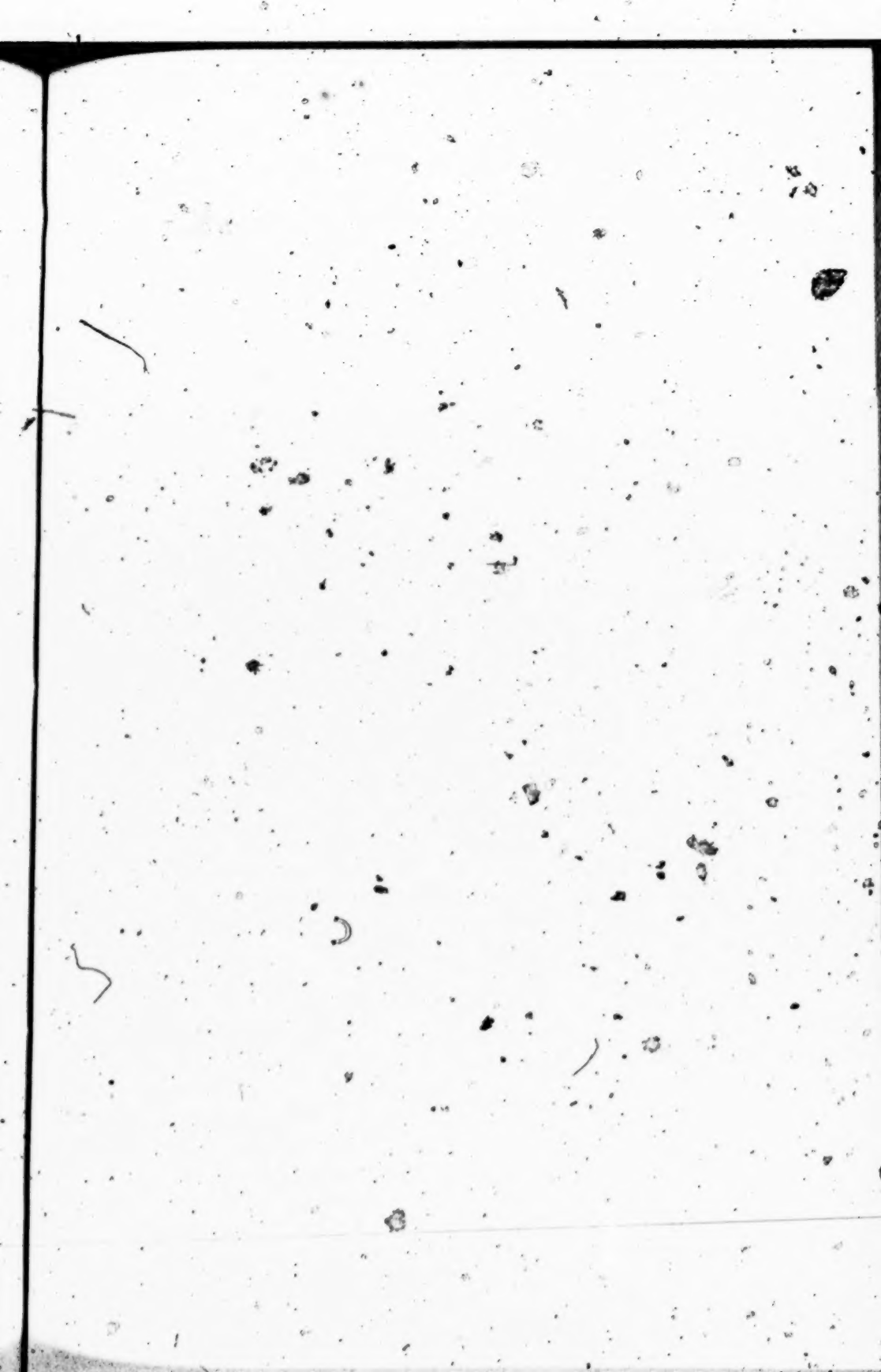
> "The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. The first section of the act here in question embraces by its terms *all* persons, firms, corporations or associations of persons who cmobine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturalists or live stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and live stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill or acts in respect of their products or stock in hand. Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live stock dealers were excluded from its operation and thereby protected from prosecution.

The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section." *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540, 565.

Respectfully submitted

By his Attorney

Jonathan Piper



SUPREME COURT OF THE UNITED STATES.

No. 731.—October Term, 1933.

Michael J. Healy, Chief of Police of Manchester, N. H., Appellant, *vs.* Louis D. Ratta.	Appeal from the United States Circuit Court of Appeals for the First Circuit.

[April 30, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on appeal from a decree of the Court of Appeals for the First Circuit, affirming a decree of the District Court for New Hampshire, which enjoined appellant, the chief of police for the City of Manchester, from enforcing the "Hawkers and Peddlers Act", c. 102, New Hampshire Laws of 1931, as an infringement of the Fourteenth Amendment. An appeal taken directly to this Court from the district court, three judges sitting, was dismissed for want of jurisdiction here since, in the lower court, appellee had waived his prayer for temporary relief. 289 U. S. 701; see *Smith* v. *Wilson*, 273 U. S. 388, 391.

The Act, effective April 14, 1931, requires payment of an annual license tax or fee for every hawker or peddler, defined to be "any person, either principal or agent, who goes from town to town, or place to place in the same town, selling or bartering, or carrying for sale or barter, or exposing therefor any goods, wares or merchandise". The tax is $50.00 for a statewide license. Local licenses are obtainable at a rate graduated according to population. That for Manchester is stated to be $85.00 for each license. Violation of the Act is punishable by a fine of not more than $200.00. Appellee's chief ground of attack upon the statute, sustained by both the courts below, is that it denies the equal protection of the laws by excepting from its operation certain classes of itinerant vendors of merchandise, in which appellee and his agents are not included.

The bill of complaint alleges that until the effective date of the Act, appellee, a resident of Massachusetts, was engaged in Manchester and elsewhere in New Hampshire in the distribution of vacuum cleaners through their sale and delivery to purchasers by

traveling salesmen; that the business was conducted in such a manner as to subject the salesmen to the tax, which they were unwilling or unable to pay; and that their arrest and prosecution, which appellant threatens if they continue to sell without paying the tax, would destroy appellee's business. The value of his business and his loss on account of the enforcement of the Act are each alleged to be more than $3,000.00. Appellant's answer and motion to dismiss the cause, as not within the jurisdiction of the district court, admit the facts stated in the complaint, so far as now material, except that they deny the allegation that the matter in controversy exceeds $3,000, the jurisdictional amount.

On this issue a trial was had, in the course of which evidence was given to show the extent of appellee's business in Manchester and elsewhere in New Hampshire and in adjoining states, and the profits derived from it in New Hampshire both before and after the enactment of the taxing statute. No interlocutory injunction was sought and after the effective date of the statute appellee changed the method of doing his business in New Hampshire in a way to avoid the necessity of a license, sales being made by sample, with later delivery by shipping the merchandise directly to the purchaser from outside the state. The business was carried on in this manner in 1931 at a loss. It appeared that the total number of salesmen employed in conducting appellee's business in Manchaster during 1931, when the statute was enacted, was six, and that in earlier years a larger number had been employed. During those years from twenty-two to twenty-seven salesmen were employed elsewhere in the state.

It is appellee's contention that the matter in controversy is either the tax which he would be required to pay annually in order to continue his business in New Hampshire, or his right to conduct the business there without payment of the tax, and that the value of each exceeds $3,000. He argues upon the evidence that the expenditure for payment of the tax which he would be obliged to bear in order to continue his business in Manchester is at least $350.00 per annum, and that the capitalized value of this expenditure would exceed $3,000.00.

The District Court concluded that as the tax which would be imposed for the conduct of appellee's business in Manchester would amount to at least $300.00 per annum, its capitalized value, which would exceed $3,000, satisfies the jurisdictional requirement.

The Court of Appeals thought that the matter in controversy was appellee's right to do business throughout the state, which it valued at more than $3,000.00.

It is conceded that the authority of appellant, as chief of police, to make arrests for violation of the statute is restricted to the City of Manchester. The bill of complaint does not allege, nor does appellee assert, that appellant will cause the arrest of his salesmen or otherwise interfere with them or with his business outside the city. The controversy here is that defined by the pleadings, see *Smith* v. *Adams*, 130 U. S. 167, 175, and the matter in controversy does not embrace more than the right asserted to restrain appellant from compelling compliance with the statute in Manchester by criminal prosecutions. Appellee neither asks, nor could he properly be awarded a decree in the present suit restraining enforcement of the law by police officers elsewhere, and the collateral effect of the decree, by virtue of *stare decisis*, upon other and distinct controversies may not be considered in ascertaining whether the jurisdictional amount is involved, even though their decision turns on the same question of law. *Lyon Brewing Co.* v. *Kantz*, 262 U. S. 77, 85; *Colvin* v. *Jacksonville*, 158 U. S. 456; *New England Mortgage Co.* v. *Gay*, 145 U. S. 123; *Vicksburg, Shreveport and Pacific R. Co.* v. *Smith*, 135 U. S. 195; *Gibson* v. *Shufeldt*, 122 U. S. 27; *Elgin* v. *Marshall*, 106 U. S. 578.

If the threatened action of appellant is not restrained, the consequence will be either the payment of the tax by appellee, or the suppression of his business in Manchester because of his failure to pay it. Hence we disregard evidence of injury to appellee's business outside the city and of the cost of licenses for doing it, and confine ourselves to the inquiry whether his right to do the business in Manchester or the tax which must be paid for doing the business there is the matter in controversy, and whether the record shows that its value does not exceed $3,000.00.

That the issue between the parties is the right of the state to collect the tax cannot be gainsaid. There is no question of the authority of a state to suppress the conduct of a business for the non-payment of an exaction lawfully imposed upon it, or of the appellant's authority to suppress the business here, by threat of criminal prosecution of the salesmen, if this tax is valid. The dispute as to the lawfulness of the tax is the controversy which alone

gives vitality to the litigation. Once that is resolved, no other issue survives for decision.

It has been said that it is the value of the "object of the suit" which determines the jurisdictional amount in the federal courts, *Mississippi & Missouri R. R. Co.* v. *Ward*, 2 Black. 485; *Packard* v. *Banton*, 264 U. S. 140, 142. But this does not mean objects which are merely collateral or incidental to the determination of the issue raised by the pleadings. The statute itself does not speak of objects of the suit. It confers jurisdiction only if "the matter in controversy exceeds . . . . the sum or value of $3,000.00". It has never been thought that the federal courts have jurisdiction of suits to restrain the collection of a property tax or other money exaction of less than the jurisdictional amount assailed as unconstitutional, merely because the penalty for non-payment, which has not been incurred, exceeds that amount. *Atlantic Coast Line Ry. Co.* v. *Railroad Commission*, 281 Fed. 321. The tax, payment of which is demanded or resisted, is the matter in controversy, since payment of it would avoid the penalty and end the dispute. See *Ross* v. *Prentiss*, 3 How. 771, 772. Whether and in what manner the penalty for non-payment may be enforced in the event the tax is valid are but collateral and incidental to the determination whether payment may be exacted. Only when the suit is brought to restrain imposition of a penalty already accrued by reason of failure to comply with the statute or order assailed can the penalty be included as any part of the matter in controversy. See *McNeil* v. *Southern Ry. Co.*, 202 U. S. 343; *Kansas City Southern Ry. Co.* v. *Ogden Levee Dist.*, 15 F. (2d) 637; compare *Barry* v. *Edmunds*, 116 U. S. 550.

The case of a tax or fee exacted for the privilege of doing a particular business presents no different considerations. Where a challenged statute commands the suppression or restriction of a business without reference to the payment of any tax, the right to do the business or the injury to it is the matter in controversy. *Scott* v. *Donald*, 165 U. S. 107; see *Bitterman* v. *Louisville & Nashville Ry. Co.*, 207 U. S. 205; *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322; *Gallardo* v. *Questell*, 29 F. (2d) 897.[1] But the possible suppression of the business here, through the prosecution of those who conduct it, is but the threatened consequence or penalty for non-payment of the challenged tax. It is true that where

[1]These and other authorities are discussed in 34 Columbia Law Rev. 311.

there is no method at law to test the legality of a tax without risk of incurring a penalty, the imminence of the penalty may involve such a threat of irreparable injury as to satisfy the requirements of equity jurisdiction. See *Matthews* v. *Rodgers*, 284 U. S. 521, 526. But the inability of a taxpayer to litigate the validity of a tax without risk of irreparable injury to his business, which is ground for invoking the equity powers of a federal court, affords no measure of the value of the matter in controversy. *Atlantic Coast Line Ry. Co.* v. *Railroad Commission, supra.* The disputed tax is the matter in controversy, and its value, not that of the penalty or loss which payment of the tax would avoid, determines the jurisdiction. See *Washington and Georgetown R. R.* v. *District of Columbia*, 146 U. S. 227; compare *Elliott* v. *Empire Natural Gas Co.*, 4 F. (2d) 493.

Not only does the language of the statute point to this conclusion, but the policy clearly indicated by the successive acts of Congress regulating the jurisdiction of federal courts supports it. Compare *Davis* v. *Mills*, 99 Fed. 39, 40. From the beginning suits between citizens of different states, or involving federal questions, could neither be brought in the federal courts nor removed to them, unless the value of the matter in controversy was more than a specified amount. Cases involving lesser amounts have been left to be dealt with exclusively by state courts, except that judgment of the highest court of a state adjudicating a federal right may be reviewed by this Court. Pursuant to this policy the jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount.[2] The policy of the statute calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. See *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233-234. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their

[2]The amount originally fixed by § 11 of the Judiciary Act of 1789 at $500, exclusive of costs, 1 Stat. 78, was increased to $2,000, exclusive of interest and costs by Act of March 3, 1887, 24 Stat. 552, and to $3,000, exclusive of interest and costs, by the Act of March 3, 1911, 36 Stat. 1091; see 28 U. S. C. A. § 41 (1).

own jurisdiction to the precise limits which the statute has defined. See *Matthews* v. *Rodgers, supra* at 525; compare *Elgin* v. *Marshall,* 106 U. S. 578.

The contested license fees must be paid annually as a condition precedent to doing the business. But it does not follow that capitalization of the tax is the method of determining the value of the matter in controversy. The bill of complaint does not allege, nor can it be assumed that the appellant will act to compel compliance with the statute by appellee in future years for which no tax is yet payable, or that the appellee will seek to continue his business in Manchester indefinitely in the future, or that the taxing act will be continued on the statute books, unmodified either as to the amount of the tax or the features to which the appellee objects. These, or like considerations, have led to the conclusion that, in suits to enjoin the collection of a tax payable annually or the imposition of penalties in case it is not paid, the sum due or demanded is the matter in controversy and the amount of the tax, not its capitalized value, is the measure of the jurisdictional amount. *Washington & Georgetown R. R. Co.* v. *District of Columbia, supra; Holt* v. *Indiana Manufacturing Co.,* 168 U. S. 67, 72; *Citizens Bank* v. *Cannon,* 164 U. S. 319; see *Atlantic Coast Line* v. *Railroad Commission, supra; Vicksburg S. & P. Ry. Co.* v. *Nattin,* 58 F. (2d) 979; cf. *Wright* v. *Mutual Insurance Co. of New York,* 19 F. (2d) 117; *Elliott* v. *Empire Natural Gas Co., supra.*

A different question is presented where the matter in controversy is the validity of a permanent exemption by contract from an annual property tax, *Berryman* v. *Whitman College,* 222 U. S. 334, 348; see *Riverside & A. Ry. Co.* v. *City of Riverside,* 118 Fed. 736; or the validity of an order of a state commission directing a railroad to construct and maintain an unremunerative spur track. *Western & Atlantic R. R.* v. *Railroad Commission,* 261 U. S. 264, 267. There the value of the matter drawn into controversy, the contract providing permanent immunity from taxation, or the order to maintain a permanent structure for an unlimited time, is more than a limited number of the annual payments demanded. Compare *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.,* 239 U. S. 121. In such a case the burden which rests on a defendant who challenges the plaintiff's allegation of the jurisdictional amount, see *Hunt* v. *New York Cotton Exchange,* 205

U. S. 322, 333, may well not be sustained by the mere showing that the annual payment is less than the jurisdictional amount.

Here the record shows affirmatively, see *Vance* v. *W. A. Vandercook & Co.*, (*No. 2*), 170 U. S. 468, that the total amount of the tax demanded, or which may be demanded, within any time reasonably required to conclude the litigation, is less than the jurisdictional amount; that any action by appellant to compel compliance by appellee or his salesmen with the taxing act in future years is at most conjectural; and that the effect of any decree rendered in the present suit upon the tax for other years, or with respect to appellee's business outside the City of Manchaster is collateral to the present controversy. The decree will be reversed, with instructions to the district court to dismiss the cause for want of jurisdiction.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.